13

Office - Supreme Court, U.S.
FILED
MAR 4 1953
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 642

CLARENCE E. HOOD, JR, ET AL.,
Petitioners,

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

W. S. Henley,
R. W. Thompson, Jr.,
Albert Sidney Johnston, Jr.,
Ben F. Cameron,
Counsel for Petitioners.

J. Ed Franklin,
J. Will Young,
Will S. Wells,
Allan T. Edwards,
E. B. Todd,
Fred C. Berger,
W. W. Dent,
T. J. Wills,
Bidwell Adam,
Clarence R. Scales,
Of Counsel.

INDEX

	Page
Petition for Certiorari	1
Jurisdictional Statement	2
Opinions Below	2
Statute Involved	2
Statement of Case	3
Questions Presented	8
Reasons Relied on for Allowance	9
Specification of Errors	13
Argument	23
I. Court of Appeals Erred in Holding Constitutional Questions Not Ripe for Decision	23
Specifications	23
Argument	24
II. Court of Appeals Erred in Not Disposing of Case Short of Constitutional Questions by Holding Indictment Failed to State Federal Crime	26
Specifications	26
Argument	28
III. Court of Appeals Erred in Holding its Jurisdiction Limited Under Terms of Criminal Appeals Act	29
Specifications	29
Argument	30
IV. Court of Appeals Erred in Setting Aside Finding by District Judge, Based on Personal Knowledge of State of Mind of Public, that Fair Trial Impossible under Prejudicial Charges of Indictment	31
Specifications	31
Argument	32

Page

V. Court of Appeals Erred in Refusing to Consider Constitutional Questions and to Hold Section 215 Unconstitutional
Specifications 32
Argument 33
Conclusion 36

LIST OF AUTHORITIES CITED

Adams v. *Tanner*, 244 U. S. 590; 61 L. Ed., 1336 20
Anderson v. *Atherton*, 302 U. S. 643; 82 L. Ed., 500 ..... 14, 30
Barrett v. *United States* (Seventh Circuit), 1936, 82 F(2) 528, Citing 18
Blitz v. *United States*, 153 U. S. 305; 35 L. Ed., 725 18
Blunden v. *United States*, 169 F(2) 991 ..... 10, 14, 16, 17
Brown v. *Walker*, (1896) 16 U. S. 591; 40 L. Ed., 819 21
Burton v. *United States*, 202 U. S. 344 33
Burstyn v. *Wilson*, 96 L. Ed., 687, Adv. Op. June 16, 1952 20
Cold Metal Process Company v. *McLoud Corporation*, 126 F(2) 185 10
Cook v. *United States*, (C.C.A. Miss. 1941) 117 F(2) 374 18
Connally v. *General Construction Company*, 269 U. S. 385; 70 L. Ed., 322 20
Collins v. *Hardyman*, 341 U. S. 651; 95 L. Ed., 1253 19
Counselman v. *Hitchcock*, (1891) 142 U. S. 547 ..... 21, 35
Crowell, etc., Company v. *Caldwell* (Fifth Circuit) 170 F(2) 941 ..... 15, 32
Cunningham v. *Neagle* (1890) 135 U. S. 1; 34 L. Ed., 55 18
Danquino v. *United States*, 192 F(2) 338 ..... 11, 15, 32
DeLaney v. *United States* (First Circuit) 199 F(2) 107 ..... 15, 32
Ex Parte Curtis, 106 U.S. 371; 27 L. Ed., 232 17
Fall v. *United States*, 49 F(2) 506 ..... 10, 14, 17
Federal Trade Commission v. *American Tobacco Company*, 264 U. S. 298, 307 ..... 21, 35
Fisher v. *State* (Miss.) 145 Miss. 116, 110 So. 361 ..... 15, 32
Glickstein v. *United States* (1911) 22 U. S. 139; 56 L. Ed., 128 21

Page

Grimsley v. *United States* (Fifth Circuit) 50 F(2) 509 ..... 13, 28
Hargett v. *United States* (C.A. Ala., 1950) 183 F(2) 859 18
Helvering v. *Gowran*, 302 U.S. 238, 82 L. Ed., 224 13
Hieke v. *United States* (1913) 227 U. S. 131; 57 L. Ed., 451 21
Hoeppel v. *United States* (C.C.A. Dist. of Col.) 85 F(2) 237, Cert. den. 299 U. S. 557 36
International Harvester Company v. *Kentucky*, 234 U. S. 216; 58 L. Ed., 1284 20
In Re Chapman * * * (1897) 166 U. S. 661; 41 L. Ed., 1154 21
James v. *Bowman*, 190 U. S. 127; 47 L. Ed., 979 ..... 16, 19
Joint Anti-Fascist Refugee Committee v. *McGrath* (1951), 95 L. Ed., Adv. Sh. 12, May 21, 1951, p. 556 15
Krulewitch v. *United States*, 336 U. S. 440; 93 L. Ed., 453 ..... 15, 31
Land v. *United States*, 177 F(2) 346 11
Love v. *United States*, (Ninth Circuit) 74 F(2) 988 36
Langnes v. *Green*, 282 U. S. 531; 75 L. Ed., 520 ..... 10, 14
McGrain v. *Daugherty* (1927) 135 U. S. —; 71 L. Ed., 580 21
McNabb v. *United States*, 318 U. S. 332; 87 L. Ed. 819 15
Marbury v. *Madison*, 1 Cranch 137, 2 L. Ed., 60 10
Maryland v. *Baltimore Radio Show*, 338 U. S. 912; 94 L. Ed., 562 23
May v. *United States* (1949) (C.A., D.C.) 175 F(2) 994 Cert. den. 338 U. S. 830, 94 L. Ed., 505 22
N.A.M., et al. v. *McGrath* (D.C., Dist. of Col.) 103 F. Supp. 510 ..... 20, 34
O'Leary v. *United States*, 56 F(2) 515 ..... 10, 13
Oklahoma v. *U.S. Civil Service Commission* (C.A. Tenth, 1946) 153 F(2) 280, 330 U. S. 127; 91 L. Ed., 794 18
Palmquist v. *United States* (C.C.A. Fla., 1945) 149 F(2) 352; cert. den. 326 U. S. 727; 90 L. Ed., 431 18

Page

Pierce v. *United States,* 314 U. S. 306; 86 L. Ed., 226 20
POWE v. *United States* (C.C.A. Ala., 1940) 109 F(2) 147; cert. den. 309 U.S. 679; 84 L. Ed. 1023 16
Pullen v. *United States* (C.A. Texas, 1947) 164 F(2) 756 19
Razete v. *United States,* 199 F(2) 44 ..... 10, 13, 16, 17
Rescue Army v. *Municipal Court,* 331 U. S. 654, 91 L. Ed. 1677 ..... 10, 13
Riley Investment Company v. *Commissioner of Internal Revenue,* 311 U. S. 55; 85 L. Ed., 36 ..... 10, 14
Rochin v. *California,* 342 U. S. 165; 96 L. Ed., 183 ..... 14, 16
Rogers v. *United States,* 179 F(2) 559; 95 L. Ed., p. 374. Adv. Sh. No. 7, March 12, 1951 22
Schneider v. *Irvington,* 308 U. S. 147; 84 L. Ed., 155 16
Schneider v. *State* (1947) 202 Miss., 137, So. 2nd. 90 23
Screws v. *United States* (1944) 140 F(2) 662 ..... 19, 20
Screws, et al. v. *United States,* 325 U. S. 91; 89 L. Ed., 1495, reversing the case above 19, 20
Smith v. *United States* (1949) 337 U. S. 137; 93 L. Ed., 1264 22
State v. *Billups* (1937) 179 Miss., 353 23
Sutton v. *United States* (Fifth Circuit) 157 F(2) 666 13
Terminillo v. *Chicago,* 337 U. S. 2; 93 L. Ed., 1133 ..... 13, 14
Tom Chan Poy v. *United States,* 15 F(2) 191 ..... 10, 14
Trade Mark Cases, 100 U. S. 82; 25 L. Ed., 550 16
United Public Workers v. *Mitchell, et al.* (1947) 330 U. S. 75; 91 L. Ed., 754—and the note following the case, 91 L. Ed., 787 16
United States v. *Armour and Company* (D. C. Ill., 1906) 142 F(2) 808 22
United States v. *Blanton* (D.C. Mo., 1945) 77 F. Supp. 812 19
United States v. *Bathgate* (1918) 246 U. S. 220; 62 L. Ed., 676 19
United States v. *Carll,* 105 U. S. 611; 26 L. Ed., 1135 ..... 13, 28
United States v. *Carignan,* 342 U. S. 36; 96 L. Ed., 48 ..... 10, 14

Page

United States v. *Curtiss-Wright Export Corporation*, 299 U. S. 304; 81 L. Ed., 255 ..... 10, 14
United States v. *Cohen*, 177 F(2) 523 11
United States v. *Classic*, 313 U. S. 299; 85 L. Ed., 1368 ..... 19, 20
United States v. *Cohen*, 255 U. S. 81; 65 L. Ed., 516 20
United States v. *Cruikshank*, 92 U. S. 542; 23 L. Ed., 588 16
United States v. *Bryan* (1950) 339 U. S. 323; 94 L. Ed., 884 22
United States v. *Carver*, 260 U. S. 482; 67 L. Ed., 361 23
United States v. *DeLorenzo* (C.C. New York, 1945) 151 F(2) 122 22
United States v. *Foote* (D.C. Del. 1942) 42 F. Supp. 717 19
United States v. *Gradwell* (1917) 243 U. S. 476; 61 L. Ed., 857 19
United States v. *Goodman*, 110 F(2) 390 11
United States v. *Monia, et al.* (1943) 317 U. S. 424; 87 L. Ed., 376 ..... 21, 23
United States v. *Malphurs* (D.C. Fla., Strum, 1948) 41 F. Supp. 817, 316 U. S. 1; 86 L. Ed., 1227 19
United States v. *Powell* (Ala., 1909) 212 U. S. 564; 53 L. Ed., 653 16
United States v. *Purdue* (D.C. Texas, 1923) 294 F. 543 22
United States v. *Petrillo*, 332 U. S. 1; 91 L. Ed., 1877 ..... 10, 13
United States v. *Pepper Brothers*, 142 F(2d) 340 10
United States v. *Reese*, 92 U. S. 214; 23 L. Ed., 563 16
United States v. *Sanges*, 144 U. S. 310; 36 L. Ed., 445 14
United States v. *Sonnenberg*, 158 F(2) 911 ..... 10, 14. 16, 18
United States v. *Spector*, 343 U. S. 169, 180; 96 L. Ed., 863, 871 33
United States v. *Swift and Company*, 318 U.S. 442; 87 L. Ed., 889 14

Page

United States v. *Thayer,* 209 U. S. 52 L. Ed., 673 (1908) 17
United States v. *Williams, et al.* (1951) 341 U. S. 70; 95 L. Ed., 758 ..... 19, 20
United States v. *Wurzbach* (U.S.D.C. Texas, 1929) 31 F(2) 774 17
United States v. *Wurzbach* (1930) 280 U. S. 396; 74 L. Ed., 508 17
White v. *Levine,* 40 F(2) 502, (Tenth Circuit) 18
Wheat v. *State* (1947) 201 Miss., 890, 30 So. 2nd. 84 23
Williams v. *United States* (1950) 179 F(2) 644 ..... 19, 20
Zambroni v. *United States* (Tenn., 1948) 170 F(2) 272 17

OTHER AUTHORITIES CITED

Amendment One to the Constitution of the United States 15
Amendment Five to the Constitution of the United States 5, 20
Amendment Ten to the Constitution of the United States 16
Amendment Eleven to the Constitution of the United States .....
Amendment to 18 U. S. C. 125 by Act of September 13, 1951 (pocket parts) U. S. Code Congressional Service, 1951 pp. 2443-7 19
11 Am. Jur., pp. 862 and 865 16
11 Corpus Juris Secundum, p. 840 17
2 U. S. C. A. 192, 193, 194 20
18 U. S. C. A. 201 ..... 11, 14, 17
18 U. S. C. A. 202 .....
18 U. S. C. A. 241, 2 19
18 U. S. C. A. 371 19
18 U. S. C. A. 597 18
18 U. S. C. A. 602 17
18 U. S. C. A. 603 17
18 U. S. C. A. 3486 22
Section 215, Chapter 11, Title 18 2
18 U. S. C. A. 602 17

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 642

CLARENCE E. HOOD, JR, ET AL.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Supreme Court of the United States:

Petitioners, Clarence E. Hood, Jr., and nine others, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered January 6, 1953, in the case of *United States* vs. *Clarence E. Hood, Jr., et al,* No. 14,086, reversing the judgment of the District Court of the United States for the Jackson Division of the Southern District of Mississippi, sustaining motion to dismiss the first count of an indictment charging conspiracy to violate Section 215, Title 18 U. S. C. Petition for Rehearing was denied without written opinion February 4th.

Jurisdictional Statement

Jurisdiction is invoked under Title 28 U. S. C., Section 1254 (1) and Supreme Court Rule 38, 5 (b).

Opinions Below

The opinion of the District Court, not reported, appears in the record at page 37, et seq. The opinion of the Court of Appeals is reported in 200 F(2) 639 (Adv. Sh.), and appears in the record at page 45, et. seq.

Other counts of this same indictment were before this Court in a case decided March 31, 1952, rehearing denied May 19, 1952, *United States* vs. *Clarence E. Hood, Jr., et al*, 343 U. S. 148, 96 L. Ed., 846, 72 S. Ct. 568. In that case the judgment of the District Court sustaining a motion to dismiss three counts of the indictment was reversed, Justices Black, Reed, Douglas and Minton dissenting.

Statute Involved

The statute under which the indictment was brought appears as a section of Chapter 11 of Title 18, entitled "Bribery and Graft". As it appeared at the time this indictment was found (it was amended September 13, 1951, 65 Stat. 320), it read as follows:

> "Whoever solicits or receives, either as a political contribution, or for personal emolument, any money or thing of value, in consideration of the promise of support or use of influence in obtaining for any person any appointive office or place under the United States, shall be fined not more than one thousand dollars or imprisoned not more than one year, or both."

Only Sections 214 and 215 essay to proscribe activities of private citizens having no connection with the government. The remaining twenty-one sections of this chapter

deal with the activities of persons acting for or occupying a place of trust with the United States or some department or agency thereof. Cf. Section 201 which sets the pattern for the remaining sections, save only Sections 214 and 215.

Statement of Case

Summary Statement

Petitioners were indicted for conspiracy to violate 18 U. S. C. 215 by soliciting and receiving contributions in return for promises of support for appointment to Federal office. They moved to dismiss, assigning twelve grounds including attack on the constitutionality of the statute. The District Court sustained their motion on the ground that the indictment was duplicitous and contained prejudicial allegations which were ineradicable by instructions because of an inflamed public opinion.

The United States appealed under 18 U. S. C. 3731. The Court of Appeals, considering only the two grounds, reversed. Petitioners had urged the Court of Appeals to affirm on grounds rejected by the District Court including constitutional attacks made on the face of the statute and on the indictment as failing to charge a crime within federal competence. These questions were fully argued before the Court of Appeals. It declined to consider these arguments which had been fully heard and rejected by the District Court.

Following the denial of their Petition for Rehearing and stay of mandate, this Petition was filed.

Fuller Statement

The District Court dismissed count one of the indictment which attempted to charge a conspiracy to violate Section 215, Title 18 U. S. C. by soliciting and receiving contributions to the Petitioners personally or to the Mississippi

Democratic Committee in return for promises to use their influence to obtain for the contributors appointments to federal office. The reasons assigned for dismissing the indictment were that it was duplicitous and that it contained prejudicial allegations which the trial court felt could not be cured by instructions to the jury because of the inflamed state of public opinion the Court found to exist (R. 37-42).

The District Court found that the indictment contained unnecessary charges to the effect that the Petitioners were connected with a "rump" state executive committee, had sought to displace the regularly constituted democratic state committee, that they would keep false books and records and in effect steal from their own organization, would recommend unworthy and unqualified people for office; and that these charges were bound to create in the minds of a petty jury a grave feeling of hostility in view of the inflamed state of public opinion (R. 41-2). The District Court felt that these volunteered charges made a fair trial impossible.

The indictment failed to charge that the defendants were members of this political committee or that the committee had any influence with any person connected directly or indirectly with the federal government; failed to charge that the defendants offered to use their influence with any person having any connection with the federal government, or that any person connected with the defendants had any connection with or proposed to use any influence with any person acting for or connected with or performing any duty for the federal government.

In the Court of Appeals, respondent sought to improve its position with respect to this deficiency by stating in its brief (Petition for Rehearing, page 12, R. 63):

> "In addition, the government can, and in this case will, show that these individuals have some direct or

indirect connection with federal officials, although they themselves do not hold any federal jobs or offices."

Petitioners had urged in the District Court twelve separate grounds in their motions to dismiss (R. 5 and 32), three of them (grounds 2, 3, and 4) claiming that said code section was unconstitutional because, on the face of the statute, it denied them rights under the First, Fifth, Sixth and Tenth Amendments. As the twelfth ground of their motions (R. 33-4), Petitioners claimed that they were entitled to immunity under the Fifth Amendment of the Constitution by reason of having been subpoenaed before the Senate Committee and interrogated about each of the acts and episodes forming the basis of the indictment (Item 10, stipulation as to the record, R. 6). Ground 1 of their motions challenged the indictment itself as failing to state facts sufficient to charge a crime within federal competence.

The District Court considered these constitutional arguments at length, and rejected them in these words taken from the opinion (R. 37-8):

> "In passing on the motion before the court which, in some respects, strikes at the vitals of the indictment in this case, I shall first consider and determine the constitutional questions which are raised by the motion and which have been ably and at great length argued by counsel.
>
> "I am of the opinion that the people of these United States have a real and vital interest in the character and ability of those who are to serve them, either as their appointed officers or as their hired hands; that this interest is so real, so vital and so necessary that their Congress has the inherent right to pass legislation which is intended to prevent the sale and barter of these offices or places and that Sec. 215, Title 18 U. S. C. is a proper exercise of that inherent power.
>
> "I do not think the statute contravenes the free speech guarantee of the Constitution. It in no way for-

bids a man to speak freely or to freely exercise his influence. It merely forbids him to prostitute his influence and to use it on Federal jobs, warped and crooked by gold or hope thereof.

"I do not think the statute contravenes the due process clause of the Constitution in being so vague and indefinite as not with reasonable clarity to point out what it makes criminal and condemns. I think the statute (Sec. 215, Title 18 U. S. C.) is not a model of clarity and could in many respects be improved upon; but it is not so vague and indefinite as to merit constitutional condemnation.

"The most serious constitutional question raised is, in my judgment, the immunity claimed by virtue of the Fifth Amendment. The court is not unaware of the greatly increased use by both Houses of Congress of investigations conducted by committees and subcommittees, and of the greatly increased impact of these activities on the lives of the citizens, nor of the need for care both on the part of the Congress itself and of the courts to see that great care is exercised to see that the constitutional right of a citizen be not taken from him in these committee hearings. However, I am not convinced that, in the present situation where no evidence taken before the Senate committee, which investigated the matters here under consideration, can be used against the defendants and where confessedly no defendant refused to answer any question on the ground that he might thereby incriminate himself, anyone has been denied any right guaranteed to him by the Constitution."

The United States appealed from the judgment dismissing count one of the indictment, and the Court of Appeals filed its opinion and entered its order reversing the judgment of the District Court, based on the two grounds assigned by the District Court in dismissing count one.

Petitioners, as appellees, had briefed the constitutional questions raised by them and decided by the District Court,

and the government had likewise briefed these questions. The Court of Appeals declined to decide the constitutional questions giving these reasons copied from its opinion (R. 50); 200 F (2) 642:

> "The appellees urge upon this Court that in the event it should conclude that the decision of the district court is not sustainable on the grounds assigned in its opinion, that then this Court should consider and pass upon the constitutionality of the statute, 18 U. S. C. A. 215. The district court decided that the statute was constitutional; if it had held otherwise, the question could have been presented on direct appeal to the Supreme Court of the United States under the Criminal Appeals Act, 18 U. S. C. A. 3731. In that event the consideration of the Supreme Court would have been limited to the construction and validity of the statute. The Criminal Appeals Act further provides that where a direct appeal to the Supreme Court is not provided from a decision or judgment dismissing any count of an indictment, an appeal may be taken by the United States to a court of appeals. But for that statute, the jurisdiction of this court would be limited to an appeal from the final judgment. 28 U. S. C. A. 1291. We should refrain from passing on the constitutionality of the statute in advance of the necessity to do so, and we think that question can best await the refinement of the issues by the proof and the final judgment.
>
> "We think that the district court erred in sustaining the motion to dismiss Count 1 of the indictment on the grounds stated in its opinion, and the judgment is therefore reversed.

Petitioners filed their Petition for Rehearing (R. 52) urging upon the Court that they had a right to have their constitutional arguments considered and passed upon and their rights protected, and that the constitutional questions were ripe for decision; that their claim of immunity from prosecution and the other rights relied on by them could

not be fully protected unless passed upon in this proceeding; and that there were no impediments in the Criminal Appeals Act, or arising from any other source to a full consideration and decision of their constitutional questions. They urged further that the indictment was not sufficient to charge a crime under the laws of the United States and that the Court of Appeals should sustain their position by affirming the District Court and disposing of the questions before it short of a consideration of the constitutional questions.

Questions Presented

1. Where an indictment for conspiracy to violate 18 U. S. C. 215 (a section of the chapter on bribery and graft) by receiving money in consideration of promise of influence in obtaining appointment to public office, fails to charge that such influence was to be used with any person connected with or acting for the United States, is it the duty of the Court of Appeals to hold that said indictment fails to charge a federal offense so as to safeguard the rights of defendant without passing on the constitutional questions raised by him?

2. Where a defendant attacks a statute as being on its face violative of the First, Fifth, Sixth and Tenth Amendments, being beyond the competence of Congress and too vague for enforcement, and claims that his right to immunity has been violated and the essential facts touching the immunity plea are stipulated in the record; and the District Court decides against him on the constitutional questions, but dismisses the indictment on other grounds thought untenable by the Court of Appeals, is the defendant entitled to have the constitutional questions passed upon by the Court of Appeals?

3. Is the jurisdiction and duty of the Court of Appeals to pass upon constitutional questions which are properly

raised and ripe for decision limited or abridged by the scheme of appeals embraced in the Criminal Appeals Act, 18 U. S. C. 3731, construed in connection with 28 U. S. C. 1291?

4. Is it the duty of the Court of Appeals, upon an appeal by the United States, to consider and pass upon the constitutionality of a statute when the District Court considered the constitutional questions and decided them in favor of the United States, but dismissed the indictment on other grounds thought by the Court of Appeals to be unsustainable?

5. Is a defendant charged with violating a statute entitled to have his attack on the constitutionality of the statute decided when the indictment, twenty-three pages long, sets forth in full detail the facts alleged to constitute such violation?

6. Where the trial court, applying his peculiar knowledge of local conditions, finds that, because of "an inflamed public opinion", a fair trial was impossible in view of unnecessary charges in the indictment that defendants had set up a "rump" political committee, had kept false books and records, etc., is it error for the Court of Appeals to set aside such finding, particularly where it does not find that the court below had been guilty of an abuse of discretion?

Reasons Relied On for the Allowance

Petitioners assign the following special and important reasons for a review upon certiorari as herein prayed for:

1. The Court of Appeals for the Fifth Circuit has decided a federal question in a way probably in conflict with applicable decisions of this Court in deciding that the Criminal Appeals Act, Title 18 U. S. C. Section 3731 required the pretermitting of the decision of constitutional issues, then ripe for decision until after the further refinement of such issues by proof and judgment; such decision being in conflict with,

United States vs. *Petrillo*, 332 U. S. 1, 91 L. Ed., 1877, *United States* vs. *Curtiss-Wright Export Corporation*, 299 U. S. 304, 81 L. Ed., 255, *Rescue Army* vs. *Municipal Court* 331 U. S. 654, 91 L. Ed., 1677, *Marbury* vs. *Madison* 1 Cranch 137, 2 L. Ed., 60; and the decision of the Court of Appeals for the Third Circuit in *United States* vs. *Pepper Brothers* 142 F (2) 340.

2. The Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court, *Riley Investment Company* vs. *Commissioner of Internal Revenue* 311 U. S. 55, 85 L. Ed., 36, *Helvering* vs. *Gowran* 302 U. S. 238, 82 L. Ed., 224, *United States* vs. *C.I.O.* 335 U. S. 106, 92 L. Ed., 1849, *Langnes* vs. *Green* 282 U. S. 531, 75 L. Ed., 520, and *United States* vs. *Carignan* 342 U. S. 36, 96 L. Ed., 48, in limiting itself, under the Criminal Appeal Act, to the reasons assigned by the District Court in dismissing the indictment, and in declining to hold, short of consideration of the constitutional questions, that the indictment failed to state a crime within the competence of the United States, a government of delegated powers. The decision also probably conflicts with that of the Court of Appeals of the Sixth Circuit in *Cold Metal Process Company* vs. *McLoud Corporation* 126 F (2) 185.

3. The Court of Appeals has decided a federal question in a way probably in conflict with the decisions of Courts of Appeals of other Circuits, to-wit, the Sixth Circuit in *Razette* vs. *United States*, 199 F(2) 44, *Blunden* vs. *United States*, 169 F(2) 991, and *Tom Chan Poy* vs. *United States*, 15 F(2) 191; the Third Circuit in *United States* vs. *Sonnenberg*, 158 F(2) 911; the Seventh Circuit in *O'Leary* vs. *United States*, 56 F(2) 515, and the *District of Columbia in Fall* vs. *United States*, 49 F(2) 506; by refusing to hold that an indictment under 18 U.S.C. 215 (a section of chapter 11 entitled "Bribery and Graft") must charge that the influence

alleged to be sold must be promised or practiced with a person "acting for or on behalf of the United States . . . in an official function . . ." (Cf. 18 U. S. C. 201.

4. In setting aside the finding of the District Judge that the prejudicial charges of the indictment were ineradicable based upon his intimate knowledge of the feelings of the people of Mississippi which he concluded had "reached a point where it might not be inaccurate to describe it as an inflamed public opinion", the Court of Appeals has failed to accord to the trial court the discretion universally given in such matters, in conflict with the decision of the Court of Appeals of the Second Circuit in *United States* vs. *Cohen,* 177 F(2) 523, the Fourth Circuit in *Land* vs. *United States,* 177 F(2) 346, the Seventh Circuit in *United States* vs. *Goodman,* 110 F(2) 390, and the Ninth Circuit in *Danquino* vs. *United States* 192 F (2) 338.

5. The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court by holding that decision of constitutional rights claimed by a defendant at every stage of the proceedings may be postponed until after final judgment where the indictment, drawn by skillful counsel, sets forth in detail the facts constituting the government's charges and fails to charge a crime within federal competence, and violates other rights claimed by the defendant under the constitution; and where the statute is attacked as being unconstitutional on its face and where the facts on which the claim of immunity are stipulated in the record.

WHEREFORE, Petitioners respectfully pray that a writ of certiorari be granted herein to the United States Court of Appeals for the Fifth Circuit directing such Court to certify the record herein to this Honorable Court, to the end that the judgment and decision of said Court of Appeals may be

reviewed, revised and the errors therein corrected; that, hearing of said cause by this Honorable Court, the judgment of the said Court of Appeals be set aside, the judgment of the District Court affirmed, or that such other proceedings be had herein as may be provided by law.

Respectfully Submitted,

W. S. Henley,
R. W. Thompson, Jr.,
Albert Sidney Johnston, Jr.,
Ben F. Cameron,
Counsel for Petitioners.

J. Ed Franklin,
J. Will Young,
Will S. Wells,
Allan T. Edwards,
E. B. Todd,
Fred C. Berger,
W. W. Dent,
T. J. Wills,
Bidwell Adam,
Clarence R. Scales,
Of Counsel.

SPECIFICATION OF ERRORS AND BRIEF

Petitioners claim that the Court of Appeals committed error in the following particulars, and they cite the cases chiefly relied upon to sustain their contentions with respect to each point.

Specification of Errors

I

The Court of Appeals Erred in Deciding That Constitutional Questions Were Not Ripe for Decision

(a) *When the Attack is Directed Against the Face of the Statute. United States* v. *Petrillo,* 332 U. S. 1, 91 L. Ed., 1877.

(b) *When Immunity From Prosecution is Claimed and the Facts are Supplied by Stipulation.*

Rescue Army v. *Municipal Court,* 331 U. S. 564, 91 L. Ed., 1666.

II

The Court of Appeals Erred in Holding That It Should Not Consider the Adequacy of the Indictment to Charge a Federal Crime, Thus Disposing of the Case Short of Consideration of the Constitutional Questions.

United States v. *Carll,* 105 U. S. 611, 26 L. Ed., 1135;
United States v. *Congress of Industrial Organizations,* 335 U. S. 106, 92 L. Ed., 1849;
Rescue Army v. *Municipal Court,* 331 U. S. 564, 91 L. Ed., 1666;
Terminillo v. *Chicago,* 337 U. S. 2, 93 L. Ed., 1133;
Grimsley v. *United States* (Fifth Circuit) 50 F(2) 509;
Sutton v. *United States,* (Fifth Circuit) 157 F(2) 666;
Razete v. *United States* (Sixth Circuit) 199 F(2) 44;
O'Leary v. *United States,* (Seventh Circuit) 56 F(2) 515;

Tom Chan Poy v. *United States,* (Sixth Circuit) 15 F(2) 191.
Fall v. *United States,* (Dist. of Col.) 49 F(2) 506;
Blunden v. *United States,* (Sixth Circuit) 169 F(2) 991;
United States v. *Sonnenberg,* (Third Circuit) 158 F(2) 911.
18 U. S. C. 201;
Rochin v. *California,* 342 U. S. 165, 96 L. Ed., 183.

III

The Court of Appeals Erred in Holding That the Criminal Appeals Act, 18 U. S. C. 3731 Limited Its Jurisdiction of the Appeal by the United States so as to Exclude Consideration of Constitutional Questions, and Contentions Rejected by the District Court.

United States v. *Curtiss-Wright Export Corporation,* 299 U. S. 304, 81 L. Ed., 255;
Langnes v. *Green,* 282 U. S. 531, 75 L. Ed., 520;
Terminillo v. *Chicago,* 337 U. S. 2, 93 L. Ed., 1133;
J. E. Riley Investment Company v. *Commissioner,* 311 U. S. 55, 85 L. Ed., 36;
United States v. *Carignan,* 342 U. S. 36, 96 L. Ed., 48;
Anderson v. *Atherton,* 302 U. S. 643, 82 L. Ed., 500;
United States v. *Sanges* 144 U. S. 310, 36 L. Ed., 445;
United States v. *Swift & Company,* 318 U. S. 442, 87 L. Ed., 889.

IV

The Court of Appeals Erred in Setting Aside the Judgment of the District Court, Based on a First-Hand Knowledge of the Inflamed Condition of the Public Mind, That a Fair Trial Was Impossible in View of Unnecessary and Prejudicial Language of the Indictment.

Krulewitch v. *United States,* 336 U. S. 440, 93 L. Ed., 453;

McNabb v. *United States,* 318 U. S. 332, 87 L. Ed., 819;

DeLaney v. *United States,* (First Circuit) 199 F(2) 107;

Fisher v. *State,* (Mississippi) 145 Miss., 116, 110 So. 361;

Danquino v. *United States,* (Ninth Circuit) 192 F(2) 338;

Crowell, etc. Company v. *Caldwell,* (Fifth Circuit) 170 F(2) 941.

V

The Court of Appeals Erred in Refusing to Consider the Constitutional Questions and to Hold 18 U. S. C. 215 Unconstitutional.

(a) "INFLUENCE" BELONGS IN THE CATEGORY OF FREE SPEECH AND IS COVERED BY THE FIRST AMENDMENT TO THE CONSTITUTION AND THE COURT TESTS 18 U. S. C. A. 215 BY LOOKING TO ALL POSSIBLE APPLICATIONS OF THE STATUTE AND NOT ALONE TO THE MANNER IN WHICH THE STATUTE AFFECTS THESE DEFENDANTS.

Amendment One to the Constitution of the United States.

Thornhill v. Alabama, (1940) 310 U. S. 88; 84 L. Ed., 1093;

West Virginia Board of Education v. *Barnett,* 319 U. S. 624, 87 L. Ed., 1628;

Joint Anti-Fascist Refugee Committee v. *McGrath,* (1951) 95 L. Ed., Adv. Sh. 12, May 21, 1951, p. 556;

United Public Workers v. *Mitchell,* et al. (1947) 330 U. S. 75, 91 L. Ed., 754—and the note following the case, 91 L. Ed., 787.

United States v. *C. I. O.,* 77 F. S. 355, affirmed 335 U. S. 107, 92 L. Ed., 1849;

Winters v. *New York,* 33 U. S. 507, 92 L. Ed., 840;

Schneider v. *Irvington,* 308 U. S. 147, 84 L. Ed., 155.

(b) THE UNITED STATES IS A GOVERNMENT OF DELEGATED POWERS, ALL CRIMES ARE STATUTORY AND STATUTES MUST BE CLEARLY BASED ON SPECIFIC CONSTITUTIONAL GRANTS OF AUTHORITY.

Tenth Amendment to Constitution 11 Am. Jur. pp. 862 & 865.

United States v. *Reese,* 92 U. S. 214, 23 L. Ed., 563;

United States v. *Cruikshank,* 92 U. S. 542, 23 L. Ed., 588;

Trade Mark Cases, 100 U. S. 82, 25 L. Ed., 550;

James v. *Bowman,* 190 U. S. 127, 47 L. Ed., 979;

United States v. *Powell,* (Ala. 1909) 212 U. S. 564, 53 L. Ed., 653;

POWE v. *United States,* (C. C. A. Ala., 1940) 109 F. (2) 147, cert den. 309 U. S. 679, 84 L. Ed., 1023;

Rochin v. *California,* 342 U. S. 165, 96 L. Ed., 183.

(c) SECTION 215 APPEARS IN THE CHAPTER "BRIBERY AND GRAFT". THE STATES ALONE MAY PUNISH BRIBERY OR FRAUD UNLESS IT IS PRACTICED BY, OR IN CONSPIRACY WITH, AN AUTHORIZED AGENT OF THE FEDERAL GOVERNMENT. THE INDICTMENTS DO NOT CHARGE THAT THE DEFENDANTS CONSPIRED WITH ANY AGENT OF THE FEDERAL GOVERNMENT.

United States v. *Sonnenberg,* (Third Circuit) 158 F(2) 911;

Blunden v. *United States,* (Sixth Circuit) 169 F(2) 991;

Razete v. *United States,* (Sixth Circuit) 199 F(2) 44 Ad. Sh.

(d) DECISIONS UNDER COGNATE STATUTES SHOW THAT SECTION 215 IS SEVERAL STEPS FURTHER REMOVED FROM POSSIBLE FEDERAL COMPETENCE THAN ANY STATUTE APPROVED BY THE COURTS. THESE DECISIONS SHOW THAT CONGRESS AND THE COURTS ARE CAREFUL TO LIMIT THESE COGNATE STATUTES TO SITUATIONS HAVING *DIRECT* IMPACT ON GOVERNMENT OFFICES, ELECTIONS, OBLIGATIONS, ETC.

1. Bribery statutes are sustainable only as to agents or employees of the United States and then only when they are acting within the scope of their agency.

18 U. S. C. A. 201;

11 *Corpus Juris Secundum*, page 840;

Blunden v. *United States* (C. A. Sixth, 1948) 169 F. (2) 991;

Zambroni v. *United States* (Tenn. 1948) 170 F (2) 272;

Fall v. *United States* (Ct. App. Dist. of Col.) 49 F. (2) 506;

Razete v. *United States* (Sixth Cir.) 199 F. (2) 44, Ad. Sh.

2. Offenses by government employees are sustainable only when the relation of master and servant exists and the offenses are limited to employees of the government.

18 U. S. C. A. 602;

Ex Parte Curtis, 106 U. S. 371, 27 L. Ed. 232;

United States v. *Wurzbach* (U. S. D. C. Texas, 1929) 31 F. (2) 774;

United States v. *Wurzbach* (1930) 280 U. S. 396, 74 L. Ed. 508.

3. Congress can legislate so as to affect outsiders only when the acts made criminal take place on government property.

18 U. S. C. A. 603;

United States v. *Thayer*, 209 U. S., 52 L. Ed. 673 (1908).

4. Congress can control the actions of outsiders with respect to government money and government jobs only by refusing to grant either when its rules are not observed; it can not punish an outsider for violating these rules.

Oklahoma v. *U. S. Civil Service Commission* (C. A. Tenth, 1946), 153 F. (2) 280, 330 U. S. 127, 91 L. Ed. 794.

5. Altering government bonds or forging endorsement of government check is not punishable by Congress unless the act is done to defraud the government—the impact must be direct.

United States v. *Sonnenberg* (Third Circuit, 1946) 158 F. (2) 911;

White v. *Levine*, 40 F. (2) 502 (Tenth Circuit).

6. Murder of, or assault against, government employees is punishable by Congress only when it grows out of or is directly connected with government employment.

18 U. S. C. A. 1114;

Cuningham v. *Neagle* (1890) 135 U. S. 1, 34 L. Ed. 55;

Barrett v. *United States* (Seventh Circuit, 1936) 82 F. (2) 528, Citing;

Cook v. *United States* (C. C. A. Miss., 1941) 117 F. (2) 374;

Palmquist v. *United States* (C. C. A. Fla., 1945) 149 F. (2) 352, Cert. den. 326 U. S. 727, 90 L. Ed. 431;

Hargett v. *United States* (C. A. Ala., 1950) 183 F. (2) 859.

7. Congress can regulate elections only when the acts made criminal directly affect federal offices and the courts show a definite disposition to avoid approaching the borderline of federal competence.

18 U. S. C. A. 597.

Blitz v. *United States*, 153 U. S. 305, 35 L. Ed. 725;

United States v. *Malphurs* (D. C. Fla., Strum, 1948) 41 F. Supp. 817, 316 U. S. 1, 86 L. Ed. 1227;
United States v. *Foote* (D. C. Delaware, 1942) 42 F. Supp. 717;
United States v. *Blanton* (D. C. Mo. 1945) 77 F. Supp. 812.

8. Decisions under the "Civil Rights" statutes demonstrate that Congress can not regulate the conduct of private individuals unless they act for or under color of a state.

18 U. S. C. A. 241, 2;
18 U. S. C. A. 371;
United States v. *Gradwell* (1917) 243 U. S. 476, 61 L. Ed. 857;
United States v. *Bathgate* (1918) 246 U. S. 220, 62 L. Ed. 676;
United States v. *Classic*, 313 U. S. 299, 85 L. Ed. 1368;
United States v. *Williams, et al.* (1951) 341 U. S. 70, 95 L. Ed. 758;
Williams, et al. v. *United States* (1950) 179 F. (2) 644;
Screws v. *United States* (1944) 140 F. (2) 662;
Screws, et al. v. *United States*, 325 U. S. 91, 89 L. Ed. 1495. Reversing the case above;
Pullen v. *United States* (C. A. Texas, 1947) 164 F. (2) 756;
Collins v. *Hardyman*, 341 U. S. 651, 95 L. Ed. 1253.

(e) THE STATUTE (18 U. S. C. A. 215) IS TOO VAGUE FOR ENFORCEMENT AS A CRIMINAL STATUTE.

Sixth Amendment to Constitution

Amendment to 18 U. S. C. 215 by Act of September 13, 1951 (Pocket Parts) U. S. Code Congressional Service, 1951, pp. 2443-7;
James v. *Bowman*, 190 U. S. 127, 47 L. Ed. 979;

International Harvester Company v. *Kentucky*, 234 U. S. 216, 58 L. Ed. 1284;
United States v. *Cohen*, 255 U. S. 81, 65 L. Ed. 516;
Connally v. *General Construction Company*, 269 U. S. 385, 70 L. Ed. 322;
United States v. *Classic*, 313 U. S. 299, 85 L. Ed. 1368;
Pierce v. *United States*, 314 U. S. 306, 86 L. Ed. 226;
Screws v. *United States* (1944) 140 F. (2) 622;
Screws, et al. v. *United States* (1945) 325 U. S. 89, 89 L. Ed. 1495. Reversing the case above;
Williams, et al. v. *United States* (1950) 179 F. (2) 644, 1950;
Winters v. *New York*, 333 U. S. 5071, 92 L. Ed. 840;
United States v. *Williams, et al.* (1951) 341 U. S. 70, 95 L. Ed. 758;
N. A. M., et al. v. *McGrath* (D. C. D. C., 1952) 103 F. Supp. 510. Motion to vacate granted by U S. Supreme Court, October 13, 1952, 97 L. Ed., Advance 29; Note, 96 L. Ed. 374;
Burstyn v. *Wilson*, 96 L. Ed. 687, Adv. Op. June 16, 1952;
Adams v. *Tanner*, 244 U. S. 590, 61 L. Ed. 1336.

(f) DEFENDANTS ARE ENTITLED TO COMPLETE IMMUNITY FROM PROSECUTION AS TO ALL MATTERS CONCERNING WHICH THEY WERE FORCED TO TESTIFY BEFORE THE SENATE COMMITTEE.

Fifth Amendment to Constitution

1. Congress compels witnesses to testify under penalty of fine and imprisonment.

2 U. S. C. A. 192, 193, 194.

2. Congressional investigations are increasing in number and scope, performing an important role in national policy, and Congress cites for contempt and punishment under those statutes who refuse to testify.

A recent compilation by the Department of Justice shows that Congress has passed resolutions and certified to United States Attorneys for prosecutions under these statutes, 141 separate individuals within the past five years.

3. Congress has known ever since *Counselman* v. *Hitchcock* in 1891 that it can not force a person to testify without giving, as a quid pro quo, complete immunity.

Counselman v. *Hitchcock* (1891) 142 U. S. 547, L. Ed. 1110.

And the series of Supreme Court cases, *infra.*

4. The court will presume that Congress does not have "An intent to defy the Fourth Amendment or to even come so near to doing so as to raise a serious question of constitutional law".

Mr. Justice Holmes in Federal Trade Commission v. *American Tobacco Company,* 264 U. S. 298, 307; 68 L. Ed., 696, 701.

Shapiro v. *United States,* 335 U. S. 28, 92 L. Ed., 1805.

5. The history of the Development of immunity statutes as revealed by decisions of the Supreme Court make it absolutely clear that Congress can not compel testimony without giving complete immunity.

Counselman v. *Hitchcock* (1891) 142 U. S. 547; 35 L. Ed., 1110.

Brown v. *Walker* (1896) 16 U. S. 591; 40 L. Ed., 819.

In Re Chapman • • • (1897) 166 U. S. 661; 41 L. Ed., 1154.

Glickstein v. *United States* (1911) 22 U. S. 139; 56 L. Ed., 128.

Heike v. *United States* (1913) 227 U. S. 131; 57 L. Ed., 451.

McGrain v. *Daugherty* (1927) 135 U. S. 71 L. Ed., 580.

United States v. *Monia, et al.* (1943) 317 U. S. 424; 87 L. Ed., 376.

United States v. *Armour & Company* (D. C. Ill., 1906) 142 F. 808.

United States v. *Purdue* (D. C. Texas, 1923) 294 F. 543.

Shapiro v. *United States* (1948) 335 U. S. 137; 92 L. Ed., 1787.

Smith v. *United States* (1949) 337 U. S. 137; 93 L. Ed. 1264.

United States v. *Bryan* (1950) 339 U. S. 323; 94 L. Ed., 884.

Rogers v. *United States* 179 F(2) 559, 95 L. Ed., p. 374. Advance Sheet No. 7, March 12, 1951.

6. The Congressional Immunity Statute, 18 U. S. C. A. 3486, is the oldest Federal Statute dealing with immunity and "furnishes a model for later immunity provisions"; it can fit into the pattern of Congressional enactments only when construed as granting the same immunity as 49 U. S. C. A. 46.

18 U. S. C. 3486.

49 U. S. C. A. 46.

Mr. Justice Frankfurter in the Monia Case 317 U. S. at 432, 87 L. Ed., at 382.

7. Congress has passed 24 separate compulsory testimony acts giving, in every one of them, complete immunity, showing this to be the National Policy.

Chief Justice Vinson in *Shapiro* v. *United States* and particularly note 4, 335 U. S. at 6, 92 L. Ed., at 1792.

8. The two cases giving a restricted scope to the Congressional immunity statute are distinguishable in their facts, and the rule evolved by the Supreme Court decisions is that set forth in the dissent of Judge Clark (151 F(2), 126).

May v. *United States* (1949) C. A. DC, 175 F (2) 994, cert. den. 338 U. S. 830, 94 L. Ed., 505.

United States v. *DeLorenzo* (1945, C.A. New York) 151 F(2) 122.

NOTE: The denial of Certiorari in the *May* case "carries with it no implication whatever regarding the Court's views on the merits of the case."

Maryland v. *Baltimore Radio Show,* 338 U. S. 912; 94 L. Ed., 562.
United States v. *Carver,* 260 U. S. 482, 67 L. Ed., 361.

9. Immunity was not waived by these Defendants by reason of the fact that it was not specifically claimed.

United States v. *Monia, et al.* (1943) 317 U. S. 424, 87 L. Ed., 376.
Shapiro v. *United States* (1948) 335 U. S. 1; 92 L. Ed., 1787.

10. State court decisions construing similar constitional provisions have been found, by the Supreme Court, very persuasive and Mississippi decisions are strongly in favor of immunity.

State v. *Billups* (1937) 179 Miss., 353.
Wheat v. *State* (1947) 201 Miss., 890, 30 So. 2nd. 84.
Schneider v. *State* (1947) 202 Miss., 137, So. 2nd. 90.

ARGUMENT

I.

The Court of Appeals Erred in Deciding That the Constitutional Questions Were Not Ripe for Decision: . . . . .

(a) *When the Attack is Directed Against the Face of the Statute*

The Court of Appeals decided this point in a way which is in direct conflict with the decision of this Court in the *Petrillo* case (332 U. S. 1). In that case, brought before the Court under the Criminal Appeals Act, this Court proceeded to examine and decide the two constitutional questions arising from the face of the statute; pretermitting

only the questions arising from the allegations of fact made in the Information.

In this case, the Court of Appeals declined to do that. It declined to consider or decide the second and third grounds of attack made by Petitioners which were based on the contention that Section 215 of Title 18 U. S. C. is void on its face as being beyond the competence of Congress under the Ninth and Tenth Amendments, interpreted against the background of the First Amendment; and also the second and fourth grounds of attack charging that Section 215 is void on its face because it is too vague and indefinite for enforcement under the Sixth Amendment (R. 32-3).

The District Court had heard these contentions at length, and decided them on their merits, holding that the statute was not unconstitutional (R. 42) on its face. The District Court felt that the questions were ripe for decision, and the government did not contend that they were not ripe for decision.

The Court of Appeals, evidently conceiving itself to be under constraint by reason of the provisions of the Criminal Appeals Act, refused to consider or pass upon these contentions of Petitioners. This was, we submit, error under the holding of the *Petrillo* case.

(b) *When Immunity From Prosecution is Claimed and the Facts Are Supplied by Stipulation*

The question of immunity was ripe for decision in the record before the Court of Appeals. The twelfth ground of Petitioners' motion to dismiss (R. 33-4) set up a claim of immunity because Petitioners had been compelled by subpoena to testify and submit their private papers and documents to a Senate Sub-committee, whose testimony and exhibits had been delivered to the Department of Justice, for use in connection with the contemplated prosecution, in vio-

lation of the Fifth Amendment and of Section 3468, Title 18 U. S. C. Affidavits establishing the facts were considered by the District Court and were transmitted to the Court of Appeals as part of the record (Items 5 and 6 of the stipulation of Counsel, R. 5-6, and see also affidavits, R. 36-42).

Item 10 of that stipulation (R. 6) showed that all of the charges of the indictment were covered by testimony forced from Petitioners under subpoena of the Committee. The following quotation furnishes all of the facts necessary for decision of the immunity question:

> "It is agreed that each of the defendants (appellees) was subpoenaed to appear before a sub-committee of the Senate Committee on Expenditures mentioned in the indictments contained in the records docketed as Case Nos. 14,087 through 14,091 of this Court, and attended the hearings in response to said subpoena, and was interrogated by the members of said committee and its counsel and gave answers to said questions concerning each of the acts, episodes, matters and things forming the basis of the charges against said defendants in the indictment."

The District Court felt that the immunity question was ripe for decision and proceeded to examine and decide it in favor of the government's contention, expressing the thought, however, that the constitutional question was serious (R. 37). The government did not contend in the District Court nor the Court of Appeals that the point was not ripe for decision. But the Court of Appeals, with the same record before it, declined to consider the question. That Court evidently felt itself limited by the terms of the Criminal Appeals Act or misconstrued the holdings of this Court in the *Petrillo* case, and the *Rescue Army* case (331 U. S. 564). In the former case, this Court felt that additional pleadings and proof "might well draw the issues into sharper focus"; and, in the latter, declined to pass on a case

from a state court where its holding was ambiguous and where the issues were not presented "with clarity, precision and certainty."

The quoted stipulation of counsel make the presentation of the immunity question in this case clear, precise and certain, and the focus is sharp. The government evidently felt that the question was ripe for decision and did not object to a consideration of the question by either the District Court or the Court of Appeals. The decision of the Court of Appeals fails to point out any lack of clarity or focus.

II.

The Court of Appeals Erred in Deciding That It Should Not Consider the Adequacy of the Indictment to Charge a Federal Crime, so as to Dispose of the Case Short of Consideration of Constitutional Questions.

The cases cited under this point above state the universally accepted principle that a court will strain hard to find a decisive point in a case, short of passing on constitutional questions. The Court of Appeals had such a point, raised by the first ground of the motions to dismiss (R. 32), "Said count of the indictment does not state facts sufficient to constitute an offense against the United States of America".

This point was directly before the Court of Appeals under the Criminal Appeals Act, but would not have been before this Court in a direct appeal by the government to it.

The rule, as set forth in the cases listed under point II of the Specifications, and in the cases cited by Mr. Justice Frankfurter in his concurring opinion in the *Petrillo* case, is stated in that opinion (332 U. S. 14-15):

> "If both the sufficiency of criminal pleading and the validity or construction of the underlying statute were

> in issue before the District Court, and views as to both were interwoven in the court's decision, this court has no jurisdiction to entertain the appeal. Under the Act of May 9, 1942, it must remand the cause to the appropriate Circuit Court of Appeals . . . Other questions may be imbedded in the case which may eventually come to the surface. But they are not brought to the surface here under the limited, specific review given by the Criminal Appeals Act."

Count one of the indictment, in the charging part, (R. 9, et seq.) fails to charge that any of Petitioners had any connection with the federal government or had any influence with anyone so connected, or had promised to use influence with anyone so connected, or had promised to use influence with any person acting for the federal government. The indictment itself, therefore, wholly fails to state a crime within Congressional competence to create. And it was the duty of the Court of Appeals to pass on this first ground of the motion to dismiss.

In its brief in the Court of Appeals, the government tacitly admitted that, without charging some connection with the federal government, the indictment would be insufficient, by its statement promising that, at the trial it would "show that these individuals have some direct or indirect connection with federal officials, although they themselves do not hold any federal jobs or offices". The omission of this vital charge from the indictment required that the motion to dismiss be sustained on the first ground, and the Court of Appeals should have affirmed the judgment of the District Court, basing its decision on this ground. No hardship will be worked on the government by striking down this indictment as the statute makes the crime charged a misdemeanor which can be set forth by the government in an Information.

Indictment Must Set Forth Essential Facts of a Federal Crime

Rule 7(c) of the Rules of Criminal Procedure requires that the indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged". The offense sought to be charged here is a species of bribery or graft. If the statute creating the crime does not contain all of the essential ingredients, it is not sufficient that the indictment charge the crime in the language of the statute, *United States* v. *Carll*, 105 U. S. 611, 26 L. Ed., 1135. "Indictment without proof can not support a conviction, so proof without indictment can not", *Grimsley* v. *United States*, (Fifth Circuit) 50 F(2) 509.

An indictment for bribery is not sufficient unless it charges that the bribery was practiced with an officer or agent of the United States acting in its behalf and within the scope of his authority. So held the Court of Appeals of the District of Columbia in *Fall* v. *United States*, 49 F(2) 506, the Sixth Circuit in *Tom Chan Poy* v. *United States*, 15 F(2) 191, and *Blunden* v. *United States*, 169 F(2) 991, and the Seventh Circuit in *O'Leary* v. *United States*, 56 F(2) 515. And see also *United States* v. *Sonnenberg*, Third Circuit, 158 F(2) 911, and 18 U. S. C. 201, the first section in Chapter 11 on "Bribery and Graft" which sets the pattern of the essential elements of bribery of a government officer.

The recent case of *Razete* v. *United States* (Sixth Circuit) 199 F(2), Adv. Sh. 44, defines these terms as follows:

> "Graft means an advantage which one person by reason of his peculiar position of superiority, influence or trust exacts from another . . . It also includes the fraudulent obtaining of public money by the corruption of public officials . . .
>
> "Bribery, a common law crime, is the offering, giving, receiving, or soliciting anything of value with the

intent to influence the recipient's action as a public official."

To come within the ambit of Chapter 11, Title 18 or of federal competence, the indictment must charge that those who did the soliciting or the receiving were public officials or occupied a position of advantage by reason of their "peculiar position of superiority, influence or trust". The indictment here is wholly silent in these important respects. It should have been stricken down by the Court of Appeals which had full authority to examine the indictment under the Criminal Appeals Act.

III.

The Court of Appeals Erred in Deciding That the Criminal Appeals Act, 18 U. S. C. 3731, Limited Its Jurisdiction of the Appeal by the United States so as to Exclude Consideration of Constitutional Questions or Contentions Rejected by the District Court.

It is implicit in the language of the five sentences preceding the conclusion stated in the opinion of the Court of Appeals that it "should refrain from passing on the constitutionality of the statute", that it felt that the scheme set up by the Criminal Appeals Act compelled it to pretermit the constitutional questions. That language implies that constitutional questions should be committed to the decision of this Court unless they arose in such a way as to bring them before the Court of Appeals after final judgment. This concept of the Criminal Appeals Act is, we submit, in conflict with the holdings of this Court.

The announcement of this Court in *United States* v. *Curtis-Wright Export Corporation*, 299 U.S. 304, 330, 81 L. Ed., 255, 268, controls:

> "The government contends that upon an appeal by the United States under the Criminal Appeals Act from

a decision holding an indictment bad, the jurisdiction of the court does not extend to questions decided in favor of the United States, but that such questions may only be reviewed in the usual way after conviction. We find nothing in the words of the statute or in its purposes which justifies this conclusion . . . Having held that this judgment can not be sustained upon the particular ground which that court assigned, it is now open to this court to inquire whether or not the judgment can be sustained upon the rejected grounds which also challenge the validity of the statute . . ."

In *Anderson* v. *Atherton*, 302 U.S. 643, 82 L. Ed., 500, this Court reversed the Court of Appeals for the Sixth Circuit which had refused to consider questions rejected by a District Court (86 F(2) 518), and remanded the case to the Court of Appeals for the determination of those questions.

Several of the cases cited under point III in the Specifications are along the same line, but a discussion of them is not necessary. Some of them are referred to with approval in the recent case of *United States* v. *Carignan*, 342 U. S. 36, 96 L. Ed., 48. Carignan, upon conviction in the District Court of Alaska, appealed and the Court of Appeals of the Ninth Circuit reversed because of wrongful admission of his confession. This Court, granting certiorari to the government, affirmed the Court of Appeals on an entirely different ground. Here is some of the pertinent language of the opinion:

"The sole ground of the reveral was the admission of a confession obtained in a manner held to be contrary to the principles expounded by this court in *McNabb* v. *United States* . . .

"Respondent advances three additional issues to support the reversal of the conviction besides the above point on detention . . .

"Since these issues were in controversy below, they are available to respondent as grounds for affirmance

of the Court of Appeals . . ." Citing *Langnes* v. *Green* and *United States* v. *Curtis-Wright Export Corporation, supra.*

And see *United States* v. *Petrillo*, supra, including the concurring opinion of Mr. Justice Frankfurter.

IV

The Court of Appeals Erred in Setting Aside the Judgment of the District Court, Based on First-Hand Knowledge of the Inflamed Condition of the Public Mind, That a Fair Trial Was Impossible in View of Unnecessary and Highly Prejudicial Language of the Indictment.

The opinion of the District Court (R. 39-41) quotes six paragraphs from the indictment occupying more than two pages in the record, attempting to set up a method of operations charged against the defendants tinctured with the worst sort of fraud in the alleged dealings of the defendants with each other and with those they were assuming to serve. These allegations had nothing to do with the bribery they were charged with practicing, and would not tend to establish the charge of bribery. These paragraphs were volunteered by the draftsman of the indictment and their effect would necessarily be prejudicial. The District Judge particularized with respect to their prejudicial character in his opinion (R. 41). The District Judge did not "believe any charge of a court would ever sufficiently remove it from their minds as to do away with its harmful and unfair effect." At the base of this conclusion lay the Judge's knowledge of the disturbed state of political feelings in the state of Mississippi which he set forth in his opinion as constituting "an inflamed public opinion".

The District Judge's opinion that the jury would be unable to disabuse its mind of what it could plainly see in the indictment has the support of the concurring opinion of Mr. Justice Jackson in *Krulewitch* v. *United States*, 336

U. S. 440, 453, 93 L. Ed. 790, 799: "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . ., all practicing lawyers know to be unmitigated fiction." His appraisal of the public mind in Mississippi was based on a knowledge peculiar to the District Judge, presumably not shared by the members of the Court of Appeals who decided the case, none of whom resides in the state. That peculiar knowledge underlies the principle that such matters are committed to the discretion of the trial judge which should be sustained unless abused. *Delaney* v. *United States* (First Circuit) 199 F. (2) 107, *Crowell* v. *Caldwell* (Fifth Circuit) 170 F. (2) 941, *Danquino* v. *United States* (Ninth Circuit) 192 F. (2) 338, *Fisher* v. *State* (Mississippi) 145 Miss., 116, 110 So. 361. The opinion of the Court of Appeals does not intimate that the District Judge had abused the discretion committed to him.

V

The Court of Appeals Erred in Refusing to Consider the Constitutional Questions and to Hold 18 U. S. C. 215 Unconstitutional.

The constitutionality of this statute is subject to grave doubt. It is fair to say, from the course of these proceedings, that the District Court and the Court of Appeals were not inhospitable to this view. The question of its constitutionality ought, in the interest of the public, to be settled. The impediments thought to be in the way of such a procedure are, we submit, not real.

These Petitioners are entitled to have their constitutional claims examined and their rights enforced:

> "In accordance with principles which are basic, the rule is fixed that the duty in a proper case to declare a law unconstitutional can not be declined and must be performed in accordance with the deliberate judgment of the tribunal before which the validity of the enactment is directly drawn into question.

> ". . . This duty of the courts to maintain the Constitution as the fundamental law of the state is imperative and unceasing . . . Any other course would lead to the destruction of the Constitution." 11 Am.

Jur., page 714, citing a number of decisions of this Court which are landmarks. However, reluctant courts may be to overturn acts of Congress, they will not let a sense of delicacy or "squeamishness"— to use the language of Mr. Justice Jackson in his dissent in *United States* v. *Spector*, 343 U. S. 169, 180, 96 L. Ed. 863, 871 citing *Terminillo* v. *Chicago*, 337 U. S. 1, 93 L. Ed. 1131—deter them when constitutional questions are ripe for decision.

The first syllabus of the recent decision of this Court in *Rochin* v. *California*, 342 U. S. 165, 96 L. Ed. 183 furnishes the words to condemn this statute:

> "The administration of criminal justice is predominantly committed to the care of the states. The power to define crimes belongs to Congress only as an appropriate means of carrying into execution its limited grant of legislative powers. Broadly speaking, crimes in the United States are what the laws of the individual states make them . . ."

To bring a statute within the ambit of federal competence, one must point to the sections of the Constitution authorizing the act. Which provisions of the Constitution can be pointed to in justifying Section 215? It is not sufficient to say, as the District Judge said in his opinion, that Congress has the inherent right to safeguard the vital interests of the people of the United States. Congress has no inherent power to legislate.

The interest to which the District Judge referred is that described by Mr. Justice Brewer in his dissent in *Burton* v. *United States*, 202 U. S. 344: "There is a certain broad sense in which the word interest is sometimes used, which describes the relation which the government has . . . to the

conduct of all its citizens. It is interested in seeing justice and righteousness obtained everywhere. It is interested in seeing that no wrongful conduct shall prevail . . ." But that sort of interest will not justify Congressional action. Before it can act, it must be able to point out the article and the section of the Constitution which gives it authority to act.

The statute seeks to justify itself by being included in the chapter on "Bribery and Graft." Congressional protection of the public from faithless officials extends only to those who have an established relationship with the government or some of its agencies. It does not extend to the conduct of private citizens seeking to sell their influence to other private citizens even when the subject of their deal is a federal office. No decision under the bribery chapter or any cognate statutes sanction an outreach of federal competence to a point remotely approaching that which will have to be reached to justify this statute.

The decisions cited in the Specifications condemn the statute as being too vague for enforcement. The language of Section 215 resembles very closely that of the Anti-Lobbying Act of 1946, 2 U.S.C. 261, et. seq., which was declared unconstitutionally vague in *N.A.M., et al* v. *McGrath* (D.C., Dist. of Col.) 103 F. Supp. 510. The reasoning of that case decided by three eminent Judges does not suffer from the granting by this Court of a motion to vacate for procedural reasons. The language of that statute was much more definite than the language of the one now before the Court.

It is worthy of note that Congress has amended Section 215 since the indictment was returned, Act of September 13, 1951, pocket parts, 18 U. S. C. The inter-departmental communications accompanying the Congressional history of this amendment show that the government officials themselves could not agree on the meaning of Section 215, as it

was written before the amendment, U. S. Code Congressional Service, 1951, pages 2443-7.

The limits of the immunity granted by 18 U. S. C. 3486 have never been clearly defined by this Court. There are twenty-four separate compulsory testimony acts (Note 4, *Shapiro* v. *United States,* 335 U. S. page 6, 92 L. Ed., 1792), and every one of them has been construed as granting complete immunity as a *quid pro quo* of compelled testimony. 18 U. S. C. 3486 is the oldest immunity statute and "furnishes a model for later immunity provisions" (317 U. S. 432). Congress has known ever since *Counselman* v. *Hitchcock,* (1891) 142 U. S. 547 that it can not compel testimony without granting complete immunity in return. If it is possible to construe 3486 as granting complete immunity, the Court will do so in order "to avoid attributing to Congress an intent to defy the Fourth Amendment or even to come so near doing so as to raise a serious question of constitutional law", Mr. Justice Holmes in *Federal Trade Commission* v. *American Tobacco Company* 264 U. S. 298, 307.

The entire constitutional question must be considered in the light of the fact that Section 215 deals with "influence", —a member of the congeries of rights which are the First Amendment. The Courts have even shown an extreme solicitude to give broad and ample protection to those rights, whatever the character or guise of the statute or scheme which essays to limit them. It is to be guilty of over-simplification to state, as the District Court did in its opinion, that the statute condemns, not the use of influence but its sale.

This Court knows that money is raised in political campaigns largely from those who expect favors. The very presence of this statute on the books would serve as a real limitation on the use of influence by those who have raised campaign funds.

No attempt is made here to argue the constitutional questions in any detail. Our contentions and the cases on which they are rested are set forth in the Specification of Errors, *supra*. The propositions there stated and the authorities cited under them, furnish an outline showing the unconstitutionality of this statute, which can be amplified either before this Court or the Court of Appeals when the questions are presented on their merits.

Conclusion

The constitutionality of Section 215 has never been passed upon by an appellate court. In the argument below, the government stated that only two reported cases had dealt with it, *Hoeppel* v. *United States* (C. C. A., Dist. of Col.) 85 F. (2) 237, certiorari denied 299 U. S. 557, and *Love* v. *United States* (Ninth Circuit) 74 F. (2) 988.

Congressman Hoeppel was convicted of conspiring with his son to sell an appointment to the United States Military Academy. The only point of law involved was whether such an appointment was covered by the language of the statute. In Love's case, the only question argued and decided was the admissibility of certain evidence.

It is significant that the legal point on which Congressman Hoeppel's case turned was digested under the heading of "Bribery". In the court below, the government quoted from H. R. No. 1366, Sixty-Ninth Congress, First Session, stating the purpose of the statute. The opening sentence of that quotation is, "This bill seeks to punish the purchase and sale of offices". A sale can be made only by a person who has dominion over the object of the sale so that he can pass title. Only an agent having authority to deliver title to an office could be punished for exercising that authority in obedience to a bribe.

The solicitation or receipt of a sum of money by a person possessed of influence by reason of his connection with the

government is a *sine qua non* of any action which would satisfy the judicial definition of "bribery and graft" or the stated purpose of the statute as above quoted.

The rejection of the government's contentions here will not leave it helpless to purify and protect government offices. The right to punish those acting authoritatively for the government plus the practice which the government uses of requiring appointees to make affidavit that no money passed in connection with the office being entered upon, afford ample protection. It is the only protection the government has provided with respect to the manifold other activities dealt with in the chapter covering "Bribery and Graft".

The fact that only two cases under the statute have found their way into the books attest to the timidity of government officials in attempting enforcement of the statute. If it is valid, the interest of law enforcement will be served by having it so adjudicated.

Petitioners are, we submit, entitled to have their constitutional rights adjudicated. They have pressed them at every stage of the proceedings. They argued them at length before the District Court and before the Court of Appeals. When one phase of the indictment was, by the government, brought to this Court, they made sure that the record before this Court stated "the question of the constitutionality of said statute and the other questions raised by defendants' pleadings were not presented to, or considered or passed on by said Court" (S. Ct. R. 17). In their brief before this Honorable Court, Petitioners (then appellees) stated at page 22: "Appellees have, at every stage of these proceedings, insisted that their constitutional rights have been denied them. They stand ready now to present their arguments challenging the constitutionality of the statute and of the proceedings taken under it, if and when the court should desire such argument. They . . .

desire that it be clearly understood that they do rely on their constitutional rights as raised by them at the various stages of these proceedings, and that they do not waive such rights."

In spite of the declaration of this Court (343 U. S. 150) in that case, "Our jurisdiction in such cases is limited to the construction of the statute involved", the government, in its brief in the Court of Appeals, in referring to the decision of this Court stated, ". . . we believe that the Supreme Court by implication upheld the validity of Section 215 . . .". (Petition for Rehearing, p. 3, R. 54.)

The public interest, fidelity to the judicial process and the right of these Petitioners to the protection of their constitutional rights combine to argue for a granting of the writ.

Respectfully submitted,

W. S. Henley,
R. W. Thompson, Jr.,
Albert Sidney Johnston, Jr.,
Ben F. Cameron,
Counsel for Petitioners.

J. Ed Franklin,
J. Will Young,
Will S. Wells,
Allan T. Edwards,
E. B. Todd,
Fred C. Berger,
W. W. Dent,
T. J. Wills,
Bidwell Adam,
Clarence R. Scales,
Of Counsel.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Argument	6
Conclusion	10

CITATIONS

Cases:

Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288	7
Calhoun v. *Massie*, 253 U.S. 170	8
Counselman v. *Hitchcock*, 142 U.S. 547	9
Federation of Labor v. *McAdory*, 325 U.S. 450	7
Heike v. *United States*, 227 U.S. 131	8
Hoeppel v. *United States*, 85 F. 2d 237, certiorari denied, 299 U.S. 557	8
Light v. *United States*, 220 U.S. 523	7
May v. *United States*, 175 F. 2d 994, certiorari denied, 338 U.S. 830	9
McCulloch v. *Maryland*, 4 Wheat. 316	8
Rescue Army v. *Municipal Court*, 331 U.S. 549	7
Smith v. *United States*, 337 U.S. 137	8
United States v. *DeLorenzo*, 151 F. 2d 122	9
United States v. *Markman*, 193 F. 2d 574, certiorari denied *sub nom. Livolsi* v. *United States*, 343 U.S. 979	9
United States v. *Hall*, 98 U.S. 343	8
United States v. *Hood*, 343 U.S. 148	3, 8
United States v. *Monia*, 317 U.S. 424	8
United States v. *Petrillo*, 332 U.S. 1	7

Statutes and rule involved:

Criminal Appeals Act (18 U.S.C. 3731)	7
R.S. 102, as amended, 52 Stat. 942, 2 U.S.C. 192	3, 9
United States Code:	
18 U.S.C. 215	2
18 U.S.C. 3486	2, 9
Rule 7(d), F. R. Crim. P.	6, 10

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 642

CLARENCE E. HOOD, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 45-51) is reported at 200 F. 2d 639.

JURISDICTION

The judgment of the Court of Appeals was entered on January 6, 1953 (R. 51) and a petition for rehearing was denied on February 4, 1953 (R. 67). The petition for a writ of certiorari was filed on March 4, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether, on a direct appeal by the Government from a dismissal of the indictment for duplicity, the Court of Appeals erred in remanding the case to the District Court without passing on the constitutionality of 18 U.S.C. 215, the statute involved, which had been sustained by the District Court.

2. Whether petitioners, who testified before a Senate committee without claiming privilege, are entitled to immunity from prosecution, in the circumstances of this case.

3. Whether the indictment contains language which is unnecessarily prejudicial and would warrant its dismissal.

STATUTES INVOLVED

18 U.S.C. 215:

> Whoever solicits or receives, either as a political contribution, or for personal emolument, any money or thing of value, in consideration of the promise of support or use of influence in obtaining for any person any appointive office or place under the United States, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

18 U.S.C. 3486:

> No testimony given by a witness before either House, or before any committee of either House, or before any joint committee established by a joint or concurrent resolution of the two Houses of Congress, shall be used

> as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege.

R. S. 102, as amended, 52 State. 942, 2 U.S.C. 192:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

STATEMENT

A thirty-four count indictment was returned [1] against petitioners in July 1951 in the United

[1] Counts thirty-one, thirty-two and thirty-three (R. 30-31) covered the sale of certain County Ration Board Chairmanships. The trial court dismissed these counts because no County Ration Board Chairmanship offices were in existence during the period of time covered by the indictment, holding that 18 U.S.C. 215 applied only to presently existing appointive offices and not to the sale of potential federal offices. On direct appeal, this Court reversed the order of the trial court dismissing these counts and remanded the case for trial. *United States* v. *Hood*, 343 U.S. 148.

States District Court for the Southern District of Mississippi (R. 9-32). Count one—the only count pertinent here—charged that petitioners (R. 10-13) conspired to violate 18 U.S.C. 215 by soliciting and receiving from numerous persons, in consideration of promises of recommendation and use of influence in obtaining certain federal positions, various sums of money as political contributions to the Mississippi Democratic Committee, and for the personal emolument of the defendants. After listing some of the contributors, the indictment further charged that it was part of said conspiracy that the defendants would represent that the contributions would be used by the Mississippi Democratic Committee in rebuilding the Democratic Party in that state; that they would require large contributions to be made in cash and refuse to give receipts therefor, and would use the name and office of the Democratic Committee to obtain large sums for their own benefit; that they would fail to report to the Committee and fail to maintain accurate records of the amounts contributed to the Committee as aforesaid; and that they would recommend for appointment persons without regard to their standing on the Civil Service Eligible list, solely on the basis of whether such persons had contributed or promised to contribute money to the Democratic Committee.

Prior to trial, petitioner Hood moved to dismiss count one on the grounds *inter alia* (1) that it did not state facts sufficient to constitute an offense against the United States; (2) that 18 U. S. C. 215, under which it was drawn, was unconstitutional;

(3) that it was duplicitous; (4) that it contained prejudicial and inflammatory language; and (5) that he was immune from prosecution because he was "compelled" to testify before the United States Senate Investigating Subcommittee on Expenditures in the Executive Department on matters covered in the indictment (R. 32-34).[2] During the argument on the motion, the other petitioners adopted petitioner Hood's motion as applicable to them.

The trial court held that 18 U. S. C. 215 was constitutional (R. 37). It rejected the claim of immunity since "confessedly no defendant refused to answer any question [before the Committee] on the ground that he might thereby incriminate himself" and therefore no defendant "has been denied any right guaranteed to him by the Constitution" (R. 37-38). However, it sustained petitioners' contention that count one was duplicitous and that the paragraphs following the list of the contributors contained language which "would be bound to create in the minds of any petit jury a grave feeling of hostility toward the defendants", the "harmful and unfair effect" of which no instruction to the jury could cure (R. 42). Accordingly, it dismissed the conspiracy count (R. 42).

On appeal, the Court of Appeals reversed the order of the District Court. It held that the in-

[2] Prior to the return of the indictment, petitioners testified before a subcommittee of the Senate Committee on Expenditures in the Executive Department concerning various matters relating to the facts in this case. They appeared under subpoena, but none of them invoked their privilege against self-incrimination when testifying. (R. 6, 33, 38.)

dictment was not duplicitous in charging a conspiracy to solicit and receive money both for political purposes and personal benefit, and that most of the allegations found prejudicial by the District Court were relevant to show that there was no necessary repugnancy between the two alleged objectives of the conspiracy. (R. 48-49.) It suggested that the allegation as to promises of support without regard to standing on a Civil Service list might be unnecessary and prejudicial, but that the appropriate remedy would be, not a motion to dismiss the entire count, but a motion under Rule 7(d), F. R. Crim. P. to strike surplusage (R. 50).

Petitioners requested that, if the Court of Appeals decided against them on the issues determined in their favor by the District Court, it should also pass upon their contentions as to constitutionality and immunity which had been overruled by the District Court. The Court of Appeals pointed out, however, that, except for the Criminal Appeals Act, it would normally be called upon to review these latter issues only after final judgment. It therefore refrained from "passing on the constitutionality of the statute in advance of the necessity to do so" because the "question can best await the refinement of the issues by the proof and the final judgment." (R. 50-51.) The opinion made no mention of the immunity question.

ARGUMENT

1. Petitioners challenge (Pet. 13, 14, 23-24) the refusal of the court below to pass upon the consti-

tutionality of 18 U. S. C. 215, but such action was clearly proper. In *United States* v. *Petrillo,* 332 U. S. 1, 5, and cases preceding it such as *Rescue Army* v. *Municipal Court,* 331 U. S. 549; *Federation of Labor* v. *McAdory,* 325 U. S. 450; *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 346-348; *Light* v. *United States,* 220 U. S. 523, 538, this Court has consistently expressed reluctance to pass upon "the constitutionality of a statute until a case involving it has reached a stage where the decision of a precise constitutional issue is a necessity." There is no such necessity in this case. Since the grounds on which the District Court had dismissed the indictment have been found erroneous, the cause is now in the same posture as if petitioner's motion to dismiss had been based solely on the constitutional and immunity issues, and had been overruled. In such event, they would have had no right of appeal before final judgment. It is possible that the case may be decided finally without ever reaching the issue of the constitutionality of section 215. And, since petitioners challenge the validity of the application of the statute to the circumstances of this case, it is particularly appropriate that the determination of constitutionality "await the refinement of the issues by the proof and the final judgment" (R. 50-51).[3]

---

[3] Petitioners' contention to the contrary notwithstanding (Pet. 29), the Court of Appeals clearly did not base its refusal to decide the constitutional questions on its lack of jurisdiction under the Criminal Appeals Act (18 U.S.C. 3731) (see R. 50-51).

In any event, there is no merit to any of petitioners' attacks upon the validity of section 215. That the enactment of section 215 was a proper exercise of legislative power is clear. Congress, which has the power to create the federal jobs involved, equally has the power to enact such legislation as is reasonable and necessary to protect such jobs from graft, corruption, bribery and sale. See *United States* v. *Hood,* 343 U. S. 148, 150; *Calhoun* v. *Massie,* 253 U. S. 170, 173-174; *United States* v. *Hall,* 98 U. S. 343, 355-356; *McCulloch* v. *Maryland,* 4 Wheat. 316.

Petitioners' further contention that section 215 does not meet the standards of definiteness and certainty required of criminal statute is without merit. *Hoeppel* v. *United States,* 85 F. 2d 237 (C. A. D. C.), certiorari denied, 299 U. S. 557. In that case, section 150 (predecessor of section 215) was held to be "clear and unambiguous."

2. Petitioners contend (Pet. 21-23) that they automatically obtained immunity from prosecution by testifying before a Congressional Committee even though they did not claim privilege. There is, however, no statute applicable to testimony before a congressional committee, comparable to those involved in *Smith* v. *United States,* 337 U. S. 137; *United States* v. *Monia,* 317 U. S. 424; and *Heike* v. *United States,* 227 U. S. 131, whereby self-incriminating testimony may be compelled, and in exchange, as it were, for such deprivation of what would otherwise be a constitutional right, there is conferred immunity from prosecution "for or on account of any transaction, matter

or thing" concerning which testimony is given. Petitioners' attempt (Pet. 20-23) to spell out such immunity from two statutes—18 U. S. C. 3486 and 2 U. S. C. 192—is patently futile. The former is simply what it purports to be—a statute forbidding the use of a witness' testimony before a congressional committee in any subsequent criminal proceeding against him; it does not confer immunity from prosecution. *Counselman* v. *Hitchcock,* 142 U. S. 547, 564-565, 585-586. The latter makes it an offense to refuse to divulge pertinent information to a congressional committee; but it cannot constitutionally be construed, by virtue of the bar of the Fifth Amendment, to apply to self-incriminating testimony. *Counselman* v. *Hitchcock, supra.* Thus, had petitioners claimed their privilege, they could not have been compelled to testify before the Committee, but, having failed to claim it, they cannot now assert that it was violated. Cf. *United States* v. *Markman,* 193 F. 2d 574 (C. A. 2), certiorari denied *sub nom. Livolsi* v. *United States,* 343 U. S. 979; *May* v. *United States,* 175 F. 2d 994 (C. A. D. C.), certiorari denied, 338 U. S. 830; *United States* v. *DeLorenzo,* 151 F. 2d 122 (C. A. 2).[4]

3. Finally, petitioners challenge, as unnecessarily prejudicial, the language in the five paragraphs

[4] Petitioners also contend (Pet. 13, 24-26) that the Court of Appeals erred in declining to consider the immunity question. The decision is completely silent on this question. Contrary to petitioners' contention (Pet. 25) that the Court of Appeals felt that the immunity question was not "ripe for decision," presumably the court agreed with the government's contention that the immunity issue was not involved. In any event, petitioners are still free to raise that question after final judgment.

of count one following the list of contributors. See Statement, *supra,* p. 4. A reading of such paragraphs discloses that the court was relying on implications which it read into the charges and not on the language of the indictment itself. All of these paragraphs are relevant as explaining the conspiracy charged. The fact that the acts charged might prove to be unpopular certainly does not mean that the prosecutor should not inform the defendants of the acts which they are alleged to have committed.[5]

CONCLUSION

The decision below is correct, and presents no conflict of decisions or question of importance. It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
FELICIA DUBROVSKY,
Attorneys.

APRIL 1953.

---

[5] While the government believes that the fifth paragraph—stating that recommendations for federal appointments would be made without regard to Civil Service Lists—is relevant as explaining the conspiracy, it has no objection to complying with the suggestion of the Court of Appeals (R. 50) that it be stricken as surplusage under Rule 7(d), F. R. Crim. P.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1953 249673 1424

INDEX

Subject Index

	Page
Petition for rehearing on denial of certiorari	1
Basic facts	1
Argument	3
Other substantial grounds available to petitioners not previously presented	3
Intervening circumstances of substantial or controlling effect	15
Conclusion	17
Certificate of counsel	17

Table of Cases Cited

Blunden v. *United States*, 169 F. 2d 991	15
Boyce Motor Lines, Incorporated v. *United States*, 342 U.S. 337, 72 S. Ct. 329; 188 F. 2d 889, 90 Fed. Supp. 996	12
Cold Metal Process Company v. *McLouth Corporation*, 126 F. 2d 185	11
Fall v. *United States*, 49 F. 2d 506	14, 15
J. E. Riley Investment Company v. *Commissioner of Internal Revenue*, 311 U.S. 55, 85 L. ed. 36	11
Langnes v. *Green*, 282 U.S. 531, 51 S. Ct. 243, 75 L. ed. 520, 35 F. 2d 447, 32 F. 2d 284	14
Long v. *United States*, 199 F. 2d 717	6
O'Leary v. *United States*, 56 F. 2d 515	8, 15
Pennsylvania Railroad Company v. *O'Rourke*, 73 S. Ct. 302, 194 F. 2d 612	7, 11
Posey v. *T.V.A.*, 93 F. 2d 726	11
Schriber-Schroth Company v. *Cleveland Trust Company*, 305 U.S. 47, 59 S. Ct. 13	3
Tom Chan Poy v. *United States*, 15 F. 2d 191	15
United States v. *Curtis-Wright Corporation*, 299 U. S. 304, 57 S. Ct. 216, 81 L. ed. 255	7, 8, 11, 13, 14, 15
United States v. *General Motors Corporation*, 323 U.S. 373, 65 S. Ct. 357	4

	Original	Print
United States v. *Holte, Clara,* 236 U.S. 140, 35 S. Ct. 271		13
United States v. *Kahriger,* 73 S. Ct. 510		7
United States v. *Strang,* 265 U.S. 491, 41 S. Ct. 165, 65 L. ed. 368		5, 6

STATUTES AND OTHER AUTHORITIES CITED

Act of Congress of June 15, 1917	5
Compiled Statutes, Title 41, Section 10205	5
United States Code, Title 18:	
Section 111	6
Section 118	6
Section 201, Chapter 11	5
Sections 215 through 223	1, 5, 8, 15, 16
Section 254	6
Section 371	1
Section 1254	9, 10, 11
United States Code, Title 28, Section 1254	9, 10, 11
Judicial Code, Section 240 (a)	10, 13

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 642

CLARENCE E. HOOD, JR., ET AL.,
Petitioners,

vs.

UNITED STATES OF AMERICA

PETITION FOR REHEARING ON DENIAL OF CERTIORARI

Your petitioners, Clarence E. Hood, Jr., Frank H. Mize, Bascom C. Beasley, Curtis Rogers, Forrest B. Jackson, Dewey McLeod, Henry Debrow, Margaret LaVerne Yelverton, James H. Wilkinson, and Roy F. Brashier, respectfully pray for a rehearing of the order of this Court dated April 27, 1953, denying their petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Basic Facts

This is a proceeding initiated by indictment, under Section 371, title 18, U. S. C., charging petitioners with conspiracy to violate 18 U. S. C. 215, by soliciting and receiving contributions in return for promises of support and use of influence in obtaining appointment to Federal office,

which eventuated in a judgment in the District Court dismissing Count One, the conspiracy count, on two of the grounds alleged, (1) that it was duplicitous, and (2) that it contained prejudicial and highly inflammable matter. The Court of Appeals reversed, and held "* * * the district court erred in sustaining the motion to dismiss Count 1 of the indictment on the grounds stated in its opinion, * * *". The factual situation is uncontradicted, inasmuch as petitioners moved to dismiss the indictment on the ground, inter alia, that it failed to state facts sufficient to charge a crime within Federal competence; that while a conspiracy may exist between one not an officer and the officer to commit the crime of bribery which the officer alone could commit, 18 U. S. C. 215 does not encompass the acts of individuals having no official connection with the Federal Government.

The indictment in our case, Count one—the only count pertinent here—charged that petitioners (R. 10-13) conspired to violate 18 U. S. C. 215, by soliciting and receiving from numerous persons, in consideration of promises of recommendation and use of influence in obtaining certain federal positions, various sums of money as "political contributions to the Mississippi Democratic Committee, and for the personal emolument of the defendants." And then follows the names of some of the contributors, and the charge is made that it was part of said conspiracy that the defendants would represent that the contributions would be used by the Mississippi Democratic Committee in rebuilding the Democratic Party in that State; they would require large contributions to be made in cash and refuse to give receipts therefor, and would use the name and office of the Democratic Committee to obtain large sums for their personal benefit; would fail to report to the Committee and fail to maintain records of the amounts and sums contributed, and would recommend persons without regard

to their standing on the Civil Service Eligible list, solely on the basis of whether such persons had contributed or promised to contribute money to the Democratic Committee.

No matter how reprehensible the acts charged in the indictment were, and are, there is no uncertainty about what the petitioners did, insofar as the Federal government is concerned; they are not charged with bribing, or attempting to bribe, a federal officer or person acting for the United States; they are not charged with receiving a bribe, or bribes, while acting as officers for, or on behalf of, the United States. The only question seems to be the legality of the action of petitioners in soliciting and receiving from numerous persons, in consideration of promises of recommendation and use of influence in obtaining certain federal positions, various sums of money "as political contributions to the Mississippi Democratic Committee, and for the personal emolument of" petitioners, as charged in Count 1 of the indictment.

ARGUMENT

Petitioners assign the following reasons for granting this petition:

Other Substantial Grounds Available to Petitioners Not Previously Presented

The decision of the court below is in conflict with the decision of this Court in *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47, 573, where the Court, at p. 13, 59 S. Ct., held that as the Circuit Court of Appeals did not pass upon other questions in the case, the causes would be reversed and remanded to it for further proceedings, in conformity with the opinion of this Court, "with respect to such claims of the patents in suit as appellant below submitted to that court for adjudication."

Since the Court of Appeals did not pass upon other

grounds presented by petitioners in the Court below, posed for decision, and submitted to it for adjudication and decision, this cause should be reversed and remanded to the Court of Appeals for further proceedings, in conformity with the opinion of this Court, with respect to the ground of the motion to dismiss that Count 1 of the indictment does not state facts sufficient to constitute an offense against the United States of America.

The decision of the court below is in conflict with the decision of this Court in *United States* v. *General Motors Corporation*, 323 U. S. 373, 65 S. Ct. 357, 359, decided January 8, 1945, of which petitioners were not advised when their petition was filed and wherein this Court granted certiorari because, as the opinion said, "We think we should review that ruling inasmuch as it is fundamental to the further conduct of the case," and modified the judgment of the Court of Appeals for the Seventh Circuit.

If the Court, in *United States* v. *General Motors Corporation, supra*, granted certiorari, and modified the judgment of the Court of Appeals for the Seventh Circuit, because the ruling of that court was fundamental to the further conduct of the case, the situation in our case is even stronger and argues for the granting of certiorari, because the ruling of the Court of Appeals for the Fifth Circuit is certainly "fundamental to the further conduct of (this) case," inasmuch as petitioners will constantly be confronted with the proposition that Count 1 of the indictment returned against them does not charge conspiracy with an officer of the United States, or a person acting in an official capacity in connection with a matter before him in such official capacity, and, further, because if Count 1 is finally held to be defective by the trial court, petitioners will have spent time and money needlessly, and be tried jointly on the remaining counts of such indictment, charging sub-

stantive offenses, whereas they could not otherwise be so indicted except for the Conspiracy Count.

The decision of the court below is in conflict with, and contrary to, the decision of this Court in *United States* v. *Strang,* 41 S. Ct. 165, 265 U. S. 491, 65 L. Ed. 368, of which petitioners were not advised when their petition was filed and wherein this Court held that an inspector of the Emergency Fleet Corporation, organized by the Shipping Board, as authorized by Act Sept. 7, 1916, and authorized by the President to exercise a portion of the power and authority granted to him by Act June 15, 1917, though all its stock is owned by the government, is not an "agent of the United States," within Criminal Code, § 41 (Comp. St. § 10205), prohibiting any member of a firm from acting as officer or agent of the United States for the transaction of business with such firm. Although in that case the demurrer of the defendant was sustained, and the United States brought error, the case is applicable, nonetheless, because it shows that Congress intended by the bribery and graft statutes, chapter 11, title 18 U. S. C. 201, (§ 215) through 223, to protect the Government against bribery and graft of its officers, or employees, or persons acting "for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency * * *, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit, or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, * * *," quoting from Section 201, title U. S. C., on Bribery and Graft.

Under the *Historical and Revision Notes*, p. 558, title 18, U. S. C., appears the following: (quote)

"When Congress enacted this section as a part of the 1909 Criminal Code, the present ramification of the executive branch were not foreseen, and, consequently, the language proved inadequate to cover every new agency as indicated by the holding in the *Strang* case (1920), 41 S. Ct. 165, 265 U. S. 491, 65 L. Ed. 368. Since then the growth of agencies, independent establishments, and Government-owned or controlled corporations has been phenomenal. It is the purpose of the inserted language to further what appeared unquestionably to be the intent of Congress, namely, *to cover all persons acting for the United States Government in an official function.*" (Emphasis supplied.)

The decision of the court below is in conflict with the decision of the Court of Appeals of the Fourth Circuit, in *Long* v. *United States*, decided November 10, 1952, 199 F. 2d 717, 719, 720, holding that when the revisers brought forward into 18 U. S. C. § 111 the provisions of former Sections 118 and 254 and, in consolidating the language of the two sections, used the initial wording of Section 118, "they contemplated no change in the law but intended that force should be a necessary ingredient of the crime denounced by the consolidated section as it manifestly was by Section 254 before the consolidation." In the opinion, at p. 720, 199 F. 2d, the Court, through Parker, Chief Judge, said:

"* * * It is worth noting that in all reported convictions under the statute, use of force in resisting the officer has been shown. See *Sparks* v. *United States*, 6 Cir., 90 F. 2d 61; *Garza* v. *United States*, 5 Cir., 159 F. 2d 413; *Cook* v. *United States*, 5 Cir., 117 F. 2d 374; *Pietrzak* v. *United States*, 5 Cir., 188 F. 2d 418; *Ochoa* v. *United States*, 9 Cir.,

167 F. 2d 341; *Brown* v. *Zerbst*, 5 Cir., 99 F. 2d 745; *United States* v. *Cameron, D. C.*, 84 F. Supp. 289; and see also *Hargett* v. *United States*, 5 Cir., 183 F. 2d 859. * * *."

In the quoted case, at p. 719, 199 F. 2d, the Court said:

"Such grouping of the section with others defining crimes in which force is a necessary element is not without significance. Noscitur a sociis. * * *."

Under both the rule of ejusdem generis and noscitur a sociis, the grouping of Section 215, title 18, U. S. C., with others defining crimes of bribery and graft of government officers, et cetera, acting in an official capacity, is not without significance.

The decision of the court below is in conflict with the decision of this Court in *Pennsylvania R. Co.* v. *O'Rourke*, decided January 12, 1953, reported in 73 S. Ct. 302, 330, of which petitioners were not advised when their petition was filed and wherein this Court granted certiorari on October 13, 1952 (Docket No. 60), because of an alleged conflict between the determination made by the Court of Appeals and an earlier decision of this Court. And, after hearing, this Court reversed the Court of Appeals for the Second Circuit, 194 F. 2d 612, and the decision of the Second Circuit was made harmonious with the decisions of other Circuits, and with the earlier decision of the Supreme Court.

The decision of the Court below is in conflict with the decision of this Court in *United States* v. *Kahriger*, decided March 9, 1953, 73 S. Ct. 510, 516, of which petitioners were not advised when their petition was filed and wherein this Court considered "respondent's (Appellee's) contention that the order of dismissal was correct because a conviction under the sections in question would violate the Due Process Clause because the classification is arbitrary and the statutory definitions are vague. * * *," citing *United States*

v. *Curtis-Wright Corp.*, 299 U. S. 304, 330, 57 S. Ct. 216, 255, 81 L. Ed. 255.

If the defenses were open under the demurrer to the facts alleged in the indictment and the judgment of dismissal, in the *United States* v. *Kahriger* case, *supra,* 73 S. Ct. 516, notwithstanding the opinion of the District Court relied only upon usurpation of state police power by the federal enactment, petitioners here have a clear right to urge, and be heard on, their defenses that Count 1 of the indictment returned against them fails to charge a federal crime under 18 U. S. C. 215 (a section of the chapter on bribery and graft) because it fails to charge that they solicited and received money in consideration of promise of influence in obtaining appointment to public office, by using such influence with any person connected with or acting for the United States, and that they paid money to such person connected with or acting for the United States; in other words, that they solicited and received bribes while acting as, or paid bribes to, persons acting in an official capacity for the United States. If it is necessary for a person having no official connection with the Federal government to conspire with one having such connection, *O'Leary* v. *United States,* 56 F. 2d 515, in order to violate the chapter on bribery and graft, then, surely, the indictment returned against petitioners herein, charging them only with soliciting and receiving from numerous persons, in consideration of promises of recommendation and use of influence in obtaining certain federal positions, "various sums of money as political contributions to the Mississippi Democratic Committee, and for the personal emolument of the defendants," as charged in Count 1 of the indictment against them, must not charge a Federal offense.

In the Government's brief in opposition to the petition for certiorari, filed herein, p. 2, "Questions Presented," are

posed only three questions, whereas petitioners presented six (6) questions, pp. 8, 9, Petition for Writ of Certiorari, the first of which is:

"Where an indictment for conspiracy to violate 18 U. S. C. 215 (a section of the chapter on bribery and graft) by receiving money in consideration of promises of influence in obtaining appointment to public office, fails to charge that such influence was to be used with any person connected with or acting for the United States, is it the duty of the Court of Appeals to hold that said indictment fails to charge a federal offense so as to safeguard the rights of defendant without passing on the constitutional questions raised by them?"

At p. 7 of the Government's brief, it is said:

"* * * Since the grounds on which the District Court had dismissed the indictment have been found erroneous, the cause is now in the same posture as if petitioner's motion to dismiss had been based solely on the constitutional and immunity issues, and had been overruled. In such event, they would have had no right of appeal before final judgment. * * *."

28 U. S. C. § 1254, provides that cases in the courts of appeals may be reviewed by the Supreme Court by three methods: "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; (2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented; and (3) By certification at

any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy."

Now the Government would make the Court of Appeal the final arbiter of all appeals from the District Courts, and preclude certiorari out of this Court, in all cases where the decision of the district court sustaining motion(s) to dismiss indictments, at the instance of defendants, was reversed, and, thereby, nullify the effect of Sec. 1254, 18 U. S. C.

While normally this Court will not grant certiorari, under § 1254, title 18, U. S. C., prior to final judgment, there are exceptions, and petitioners believe this to be such exception. For example, it is uniformly held that Federal appellate courts must always consider the question whether an indictment charges an offense and whether the Court below had jurisdiction. If the indictment did not charge a federal offense, the District Court did not have jurisdiction to proceed. The question posed here is a substantial one, not previously decided by this Court. It is so fundamental, that the whole course of the case will be determined by the final decision of this Court. As an Appendix to the Revised Rules of the Supreme Court of the United States, at p. 5, of such Appendix, appears Sec. 240(a), as follows:

"In any case, civil or criminal, in a circuit court of appeals, or in the Court of Apppeals of the Distict of Columbia, it shall be competent for the Supreme Court of the United States, *upon the petition of any party thereto*, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it *with the same power and au-*

thority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

The question, then, is does § 1254, 18 U. S. C., supersede the Act, to the effect that only the Government may require by certiorari before final judgment, that the cause be certified to the Supreme Court for determination by it with the power and authority, and with like effect, "as if the cause had been brought there by unrestricted writ of error or appeal"?

If the indictment is bad, upon any ground raised by the motion(s) to dismiss, and the judgment of the District Court may be sustained upon any such ground, is it not the power and duty of this Court to so decide, and save petitioner the expense and tribulation of a long Court fight? And, then, finally, raise the defect in the indictment here by motion for judgment of acquittal, et cetera.

All defenses raised by petitioners are open under the motions to dismiss on the facts alleged in the indictment and the judgment of dismissal, although the opinion of the District Court relied only upon the two grounds mentioned in the opinion (R. 37, et seq.).

If this Court will grant certiorari where there is an alleged conflict between the determination made by the Court of Appeals and an earlier decision of this Court, *Pennsylvania R. Co.* v. *O'Rourke, supra,* 73 S. Ct. 302, a motion to dismiss an indictment sustained by an order of the trial court on one ground, will be supported on appeal, or certiorari, by any sufficient ground. *Posey* v. *TVA,* (Fifth Circuit) 93 F. 2d 726; *Cold Metal Process Company* v. *McLouth Corporation, Sixth Circuit,* 126 F. 2d 185; *J. E. Riley Investment Company* v. *Commissioner of Internal Revenue,* 311 U. S. 55, 85 L. Ed. 36; *United States* v. *Curtis-Wright Export Corporation,* 299 U. S. 304, 81 L. Ed. 255.

Answering the Government's contention, that because the Court of Appeals found the grounds on which the District Court dismissed the indictment were erroneous, "the cause is now in the same posture as if petitioner's motion to dismiss had been based solely on the constitutional and immunity issues, and had been overruled. In such event, they would have had no right of appeal before final judgment," we call the Court's attention to the case of *Boyce Motor Lines, Inc.* v. *United States,* decided January 28, 1952, and reported in 342 U. S. 337, 72 S. Ct. 329-333, where the Boyce Motor Lines, Inc. was charged with violating regulation of the Interstate Commerce Commission providing that drivers of motor vehicles transporting any explosive, inflammable liquid, inflammable compressed gas, or poisonous gas shall avoid, so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings. The United States District Court for the District of New Jersey, William F. Smith, Jr., 90 F. Supp. 996, rendered an order dismissing certain counts of the indictment and the United States appealed. The Court of Appeals, 188 F. 2d 889, reversed the order and remanded the cause with directions and Boyce Motor Lines brought certiorari. This Court, through Mr. Justice Clark, held that the regulation is valid and does set forth an ascertainable standard of guilt.

So, contrary to Government Counsel's position, this Court will, and does, grant certiorari to review decisions of the Courts of Appeal, reversing District Courts sustaining motion to dismiss indictments and counts thereof.

And, while the Court, in the *Boyce Motor Lines* v. *United States Case,* supra, at p. 332, 72 S. Ct., said: "* * * (I)f it is true that in the congestion surrounding the lower Hud-

son there was no practicable way of crossing the River which would have avoided such points of danger to a substantially greater extent than the route taken, then petitioner has not violated the Regulation. But that is plainly a matter for proof at the trial, * * *'' in our case there is no ''matter for proof at the trial,'' since within the four corners of the indictment is the Government's whole case; unless petitioners conspired with an officer or employee of the Government or any other for an offense that only he could commit, there is no punishable conspiracy. *United States* v. *Clara Holtc,* 236 U. S. 140, 35 S. Ct. 271, 273.

The Government appealed to the Circuit Court. If the Order of dismissal of the indictment, in favor of petitioners, was good upon any ground, it should have been supported and sustained on appeal. *United States* v. *Curtis-Wright Export Corporation,* 299 U. S. 304, 81 L. Ed. 255.

If it is competent for this Court to require by certiorari that ''the case'' be certified for determination by it with the same power and authority, and with like effect, ''as if the cause had been brought * * * (here) by unrestricted writ of error or appeal, Sec. 240(a), then, surely, petitioners are entitled to have all of their defenses passed on by this Court ''although the opinion of the District Court relied only upon'' the grounds stated in its opinion. *United States* v. *Curtis-Wright Corp.,* 299 U. S. 304, 330, 57 S. Ct. 216, 225, 81 L. Ed. 255, where the Court, at p. 225, 57 S. Ct., said:

''* * * Having held that this judgment cannot be sustained upon the particular ground which that court assigned, it is now open to this Court to inquire whether or not the judgment can be sustained upon the rejected grounds which also challenge the validity of the statute and, therefore, constitute a proper subject of review by this court under the Criminal Appeals Act (18 U. S. C. A. § 682) *United*

States v. *Hastings,* 296 U. S. 188, 192, 56 S. Ct. 218, 219, 80 L. Ed. 148. * * *."

The decision of the court below is in conflict with, and contrary to, the decision of this Court in *Langnes* v. *Green,* 282 U. S. 531, 51 S. Ct. 243, 75 L. Ed. 520, where the decree of a District Court (32 F.(2d) 284) had been assailed upon two grounds and the Circuit Court of Appeals (35 F.(2d) 447) had sustained the attack upon one of such grounds only, and this Court held that respondent in certiorari might nevertheless urge in this court in support of the decree the ground which the immediate appellate court had rejected. In the *United States* v. *Curtis-Wright Export Corporation Case,* supra, 57 S. Ct. 216, 225, this Court said:

"That principle is applicable here."

The Court of Appeals, in reversing the Order of the District Judge, said:

"We think that the district court erred in sustaining the motion to dismiss Count 1 of the indictment *on the grounds stated in its decision,* and the judgment is therefore REVERSED." (Emphasis supplied)

But what of the other grounds urged by the motion to dismiss?

If a successful party may urge in this Court, in support of the judgment, in his favor, the ground which the immediate appellate court has rejected, the question posed by petitioners, in their petition for certiorari, (1), page 8, of the printed petition and brief filed herein, and argued at pp. 26, 27, 28, and 29, is now squarely before the Court. And, since an indictment for bribery is fatally defective unless it charges that the bribery was practiced with an officer or agent of the United States, acting in its behalf, within the scope of his authority, *Fall* v. *United States,* 49

F. 2d 506, *Tom Chan Poy* v. *United States,* 15 F. 2d 191, *Blunden* v. *United States,* 169 F. 2d 991, and *O'Leary* v. *United States,* 56 F. 2d 515, it is now open to this Court to inquire whether or not the judgment of the district court, sustaining petitioners' motion to dismiss, can be supported and sustained upon the rejected grounds, which also challenge the validity of such indictment. If the order of dismissal was correct upon any ground urged by petitioners, this Court should consider such contention(s), and decide the question. *United States* v. *Curtis-Wright Corp.,* 299 U. S. 304, 330, 57 S. Ct. 216, 225, 81 L. Ed. 255.

The Government in our case appealed to the Court of Appeals from an Order dismissing Count One of the indictment *on the grounds stated in its opinion.* (Emphasis supplied) The Court of Appeals did not pass upon, and decide, the contention of petitioners that the indictment was insufficient, and fatally defective, because it failed to charge a federal offense, and failed to state facts sufficient to charge a crime within federal competence. Both the District Court and the Court of Appeals construed the indictment, and not the statute under which it was allegedly returned.

Our case is now presented for rehearing on the basis of a conflict between the Court of Appeals and other Courts of Appeal, and between said Court of Appeals and this Court not heretofore known to exist, in addition to the grounds asserted in the original petition, which we believe to be meritorious.

Intervening Circumstances of Substantial or Controlling Effect

Moreover, events since the denial of the petition on April 27, 1953 demonstrate that countless other indictments, charging conspiracy to violate 18 U. S. C. 215, will be sought in the District Courts of Illinois, and elsewhere.

Formerly, the threat related primarily to cases involving bribery and graft to persons acting in an official capacity for the Government. Now, with the decision of the Court of Appeals for the Fifth Circuit in its favor, the Government will seek indictments involving unlimited political activity, not connected with bribery of persons having official connection with the United States, on the claim that such activities violate 18 U. S. C. 215.

We urge the necessity for a decision on the question posed in our case, and emphasized here, whether in an indictment under 18 U. S. C. 215, it is necessary to charge that defendants (petitioners) offered, paid, or solicited and received, a bribe to, or from, an officer or agent of the United States, acting in its behalf, and within the scope of his authority, concerning a matter then pending before him in his official capacity; and whether in an indictment under 18 U. S. C. 215, it is necessary to charge that defendants (petitioners) in soliciting and/or receiving remuneration (bribes) for political contributions and as personal emoluments, were then officers or agents of the United States, acting in its behalf in an official capacity, and within the scope of their authority as such officers and agents, about matters then pending before them, in such official capacity. Without such decision from this Court there will be constant litigation and relitigation of the same substantial question, not previously presented to, and decided by, this Court. This Court has often stated that the denial of a petition for certiorari is not to be construed as a decision on the merits. That being the case, United States Attorneys throughout the land, will continue to draw indictments under 18 U. S. C. 215, and charging conspiracy to violate 18 U. S. C. 215, in situations where no official connection with the Federal Government may be shown, or can be shown, by the Government.

Conclusion

For the foregoing reasons, petitioners respectfully pray that the Order of this Court denying their petition for a writ of certiorari to the Court of Appeals for the Fifth Circuit be reheard and vacated, and that their said petition may be granted.

Dated May 8th, 1953.

BEN F. CAMERON,
R. W. THOMPSON, JR.,
W. S. HENLEY,
ALBERT SIDNEY JOHNSTON, JR.,
Counsel for Petitioners.

CERTIFICATE OF COUNSEL

The undersigned, Albert Sidney Johnston, Jr., Attorney for petitioners, hereby certifies that the petition for rehearing filed in this cause is presented in good faith, that in his judgment said petition is restricted to the grounds specified in paragraph 2 of Rule 33, as amended, and that said petition for rehearing is not interposed for delay.

ALBERT SIDNEY JOHNSTON, JR.,
Counsel for Petitioners.

(8200)